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Supreme Court, U.S.
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In The
Supreme Court of the United States

PAXTON RESOURCES, L.L.C.,

Petitioner,

v.

DAN M. "BUCK" BRANNAMAN AND
MARY C. BRANNAMAN,

Respondents.

On Petition For A Writ Of Certiorari From The Supreme Court Of Wyoming

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Wyoming's dismissal of petitioner's appeal based on an unexpected, unforeseeable interpretation of state procedural law that was applied retroactively deprived petitioner of its right to due process of law under the Fourteenth Amendment to the United States Constitution?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Paxton Resources, L.L.C., states that it has no parent companies and that no publicly held company holds any of its stock.

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

Paxton Resources, L.L.C. v. Brannaman, 2004 Wy. 93, 95 P.3d 796 (Wyo. 2004). App. 1-App. 14.

BASIS FOR SUPREME COURT JURISDICTION

The Supreme Court of Wyoming Court entered its judgment on August 12, 2004. The court denied petitioner's motion for rehearing on September 8, 2004. Petitioner seeks review of the court's judgment on a writ of certiorari.

The Court has jurisdiction under 28 U.S.C. § 1257(a) to review on a writ of certiorari the judgment of the highest state court in which a decision could be had where a right under the United States Constitution is claimed.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

WYOMING PROCEDURAL RULES INVOLVED

Rule 2.01(a) of the Wyoming Rules of Appellate Procedure provides in pertinent part: "An appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order and concurrently serving the same in accordance with the provisions of Rule 5, WYO. R. CIV. P., (or as provided in WYO. R. CR. P.

32(c)(4)). Within five days of the filing of the notice of appeal with the clerk of the trial court, a copy of the notice of appeal shall also be filed with the clerk of the appellate court, and in a criminal case upon the office of public defender and the office of attorney general." WY. R. APP. P. 2.01(a).

Rule 2.02 of the Wyoming Rules of Appellate Procedure provides as follows:

> (a) The running of the time for appeal in a civil case is tolled as to all parties by the timely filing of a motion for judgment under Rule 50(b), WY. R. CIV. P.; a motion to amend or make additional findings of fact under Rule 52(b), WYO. R. CIV. P., whether or not alteration of the judgment would be required if the motion is granted; a motion to alter or amend the judgment under Rule 59, WYO. R. CIV. P., or a motion for a new trial under Rule 59, WYO. R. CIV. P.
>
> (b) The full time for appeal commences to run and is to be computed from the entry of any order granting or denying a motion for judgment; a motion to amend or make additional findings of fact; or a motion to alter or amend the judgment, or denying a motion for a new trial. If no order is entered, the full time for appeal commences to run when any such motion is deemed denied.

WY. R. APP. P. 2.02.

Rule 6(c)(2) of the Wyoming Rule of Civil Procedure provides: "A request for hearing may be served by the moving party or any party affected by the motion within 30 days after service of the motion. Absent a timely request for hearing the court may, in its discretion, determine the motion without a hearing. A motion not determined within 90 days after filing shall be deemed denied. A party whose motion has been deemed denied shall have 10 days after the effective date of such denial to serve such pleadings or other papers, if any, as may be required or permitted." WY. R. CIV. P. 6(c)(2).

STATEMENT OF THE CASE

A. The Underlying Lawsuit and Jury Verdict

On November 23, 1999, petitioner Paxton Resources, L.L.C. ("Paxton") entered into a Surface and Damage Agreement ("agreement") with respondents Dan and Mary Brannaman. The agreement entitled Paxton to conduct drilling operations on land owned by the Brannamans, subject to certain limitations and obligations. With its operations, Paxton endeavored to extract subsurface minerals to which it owned the rights.

On February 6, 2002, the Brannamans filed suit against Paxton in a Wyoming state district court, alleging that Paxton violated the agreement and committed various torts in the course of conducting its drilling operations. The case proceeded to trial and, on February 7, 2003, the jury returned a verdict against Paxton, finding that it breached the agreement and violated an implied covenant of good faith and fair dealing. As a result, the jury awarded $810,887.00 in damages to the Brannamans.

B. Post-Trial Proceedings

On February 25, 2003, Paxton filed a timely motion with the district court for judgment as a matter of law under WY. R. CIV. P. 50(b), and, in the alternative, new trial or remittitur under WY. R. CIV. P. 59. App. 48-50. Paxton also timely requested a hearing on the motion. The next day – February 26, 2003 – the court entered judgment against Paxton on the basis of the jury's verdict. App. 19-20. However, the district court subsequently entered an order on March 31, 2003, granting Paxton's request for a hearing on its post-trial motion and setting a date for that hearing. App. 16. The court conducted the hearing on Paxton's post-trial motion on June 9, 2003, App. 54-59, and entered an order denying Paxton's post-trial motion on June 27, 2003. App. 17-18.

C. Paxton's Appeal to the Supreme Court of Wyoming

On July 3, 2003, shortly after the trial court signed an order denying Paxton's post-verdict motions, Paxton filed a notice of appeal with the Supreme Court of Wyoming.[1] App. 51-53. Paxton appealed both the district court's judgment and its order denying Paxton's post-trial motions.

The Brannamans filed a motion with the Supreme Court of Wyoming to dismiss Paxton's appeal on the ground that it was untimely because it was not filed within thirty (30) days of the date Paxton's post-trial motion was deemed denied. Under Wyoming law, an appeal must be taken within 30 days from the entry of an appealable order. WY. R. APP. P. 2.01(a).[2] The timely filing of a motion for judgment as a matter of law or motion for new trial, however, tolls this period until the entry of an order granting or denying the motion, at which point the 30-day time period for filing a notice of appeal runs anew. *See id.* 2.02. Upon the filing of a post-trial motion, any affected party may request a hearing on the motion within 30 days after service of the motion. WY. R. CIV. P. 6(c)(2). If no hearing is requested, the court may determine the motion without a hearing, and the rules provide that a "motion not determined within 90 days after filing shall be deemed denied." *Id.* When a motion for judgment or new

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[1] The Supreme Court of Wyoming considers appeals directly from state district courts. *See* WY. CONST. art. 5, § 18. An appeal from the final judgment of a district court to the state supreme court is an appeal as of right. *See In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 803 P.2d 61, 67 (Wyo. 1990).

[2] Under Wyoming law, court rules have "the force and effect of a statute and [are] to be construed in the same manner as a statute." *Lapp v. City of Worland*, 612 P.2d 868, 874 (Wyo. 1980) (citation omitted).

trial is deemed denied, "the full time for appeal commences to run when any such motion is deemed denied." WY. R. APP. P. 2.02(b).

The Supreme Court of Wyoming granted the Brannamans' motion to dismiss Paxton's appeal. Because Paxton filed a timely motion for judgment or a new trial, the time period for appealing the district court's order of judgment was tolled until resolution of the motion. *Id.* 2.02(a). The Supreme Court of Wyoming found that – even though Paxton had timely requested and been granted a June 9, 2003, hearing on its post-trial motion *prior to* the deemed denied date in WY. R. CIV. P. 6(c)(2) and even though the trial court later entered an order expressly denying Paxton's post-trial motions – Paxton's post-trial motion was deemed denied pursuant to WY. R. CIV. P. 6(c)(2) on May 27, 2003 because the district court did not decide the motion within 90 days of its filing on February 25, 2003. The court then determined that, according to WY. R. APP. P. 2.02, Paxton's time to appeal commenced on the deemed denied date of May 27, 2003, and terminated 30 days thereafter on June 26, 2003. Since Paxton did not file its notice of appeal until July 3, 2003, the court concluded that the appeal was untimely and that it lacked jurisdiction to consider the appeal pursuant to WY. R. APP. P. 1.03.

Paxton filed a motion for rehearing, which the court denied on September 8, 2004. App. 21-22. The court thereafter issued a mandate dismissing Paxton's appeal and stating that the state trial court's judgment remains in full force and effect. App. 15.

Paxton filed a motion with the Supreme Court of Wyoming to stay its mandate pending certiorari proceedings, App. 23-29, but the court informed Paxton that it did not have jurisdiction under state law to grant such a stay and that Paxton should seek such relief from the district court. App. 30. Paxton has filed a motion with the district court seeking a stay of enforcement of its judgment, App. 31-33, and a hearing has been set on the motion for

January 5, 2005. Paxton now petitions this Court for a writ of certiorari for review of the judgment of the Supreme Court of Wyoming.

D. Why Presentment of Federal Question to State Court Is Excused

Paxton did not present its due process claim to a Wyoming state court until it sought a stay from the Supreme Court of Wyoming, App. 26-27, nor did any Wyoming state court address the claim. Therefore, this petition cannot specify the stage during state court proceedings at which this federal question was raised or decided in accordance with SUP. CT. R. 14.1(g)(i). Nonetheless, Paxton's failure to present the federal question to a Wyoming state court does not deprive this Court of jurisdiction.

This Court ordinarily will not consider a petitioner's federal claim under 28 U.S.C. § 1257 unless the claim "was either addressed by, or properly presented to, the state court that rendered the decision [the Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). However, when a state's highest court adopts an unexpected interpretation of state law, "this Court has held federal claims to have been adequately presented even though not raised in lower state courts." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980). As will be shown, the Supreme Court of Wyoming adopted an unexpected interpretation of state law in this case. Therefore, this Court should find that Paxton's claim has been adequately presented even though it was not addressed to a lower court prior to Paxton's request for a stay.

REASONS FOR GRANTING THE PETITION

I. THE SUPREME COURT OF WYOMING'S DISMISSAL OF PAXTON'S APPEAL BASED ON AN UNFORESEEABLE, RETROACTIVE INTERPRETATION OF STATE LAW DEPRIVED PAXTON OF ITS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

The due process clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."[3] U.S. CONST. amend. XIV, § 1. This clause contains both a procedural and a substantive dimension. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000). The substantive dimension of the due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), while the procedural dimension requires states to provide a person adequate procedural safeguards before depriving her of life, liberty, or property. *See Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990).

Paxton's claim relates solely to procedural due process. In order to succeed on a procedural due process claim, a claimant must show that it was deprived by state action of a protected interest in life, liberty, or property without due process of law. *See id.* at 125. Paxton certainly has a protected property interest in money that it rightfully owns, *see Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972), and, by dismissing Paxton's appeal and mandating

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[3] Although Paxton is a corporation, it enjoys the protections of the due process clause, for "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (stating that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses" of the Fourteenth Amendment).

that the $810,887.00 state trial court judgment against Paxton be given full force and effect, the Supreme Court of Wyoming is depriving Paxton of such a property interest. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 679 (1930). As this Court has explained:

> The action of state courts in imposing penalties . . . without providing adequate notice and opportunity to defen[d], has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment.

Shelley v. Kraemer, 334 U.S. 1, 16 (1948).

Furthermore, this deprivation is a result of state action, for the official acts of a state's judiciary constitute state action under the Fourteenth Amendment. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984); *Shelley*, 334 U.S. at 18 ("Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government."); *Brinkerhoff-Faris*, 281 U.S. at 680 ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."). The principal issue is thus whether the Supreme Court of Wyoming's dismissal of Paxton's appeal violates Paxton's constitutional right to due process of law.

A. A State Court Deprives a Litigant of Due Process of Law When It Adopts and Applies Retroactively an Unforeseeable Interpretation of State Procedural Law.

A state court violates a litigant's Fourteenth Amendment right to procedural due process when it adopts and

applies retroactively an unforeseeable interpretation of a state procedural rule that conflicts with the rule's express language and overrules a consistent line of that court's procedural decisions so as to deny the litigant the opportunity to defend its substantive rights. This Court expressly recognized this principle in *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), stating as follows:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and to defend (his) substantive right.

(quotation omitted); *see also Brinkerhoff-Faris*, 281 U.S. 673 (finding that a state supreme court denied a litigant of procedural due process by recognizing retroactively, in conflict with its prior established precedent, the availability of an administrative remedy, which had the effect of denying the litigant the opportunity to obtain substantive review of its claim). As Chief Justice Rehnquist explained in his concurring opinion in *Bush v. Gore*, 531 U.S. 98, 115 (2000), where the highest court of a state interprets state law and "impermissibly distort[s]" that law beyond "what a fair reading require[s]," this Court will not "attach definitive weight to the pronouncement of [the] state court."

This Court has held in other contexts as well that a litigant cannot be made to suffer the consequences of a state court's interpretation of a state procedural rule when that interpretation is unforeseeable. For example, in *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court considered whether a judgment of the Alabama Supreme Court was based on an independent and adequate state ground so as to deprive the Court of jurisdiction to consider the NAACP's federal constitutional claims. In the decision under review, the Alabama Supreme Court refused to consider the NAACP's federal constitutional claims because the organization sought appellate review in

an improper manner under state law. *Id.* at 454-55. This Court held that the state supreme court's procedural ruling was not an independent and adequate basis for its judgment on these claims because the ruling was irreconcilable with the state court's prior decisions. *Id.* at 456. Principles of notice and fairness, the Court noted, dictated this result: "[A] local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence." *Id.* at 457. Because the NAACP placed "justified reliance" on the Alabama Supreme Court's past precedent and because "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court," *id.*, this Court found that it possessed jurisdiction to consider the NAACP's constitutional claims.

In *Wright v. Georgia*, 373 U.S. 284 (1963), a criminal defendant claimed that, in violation of the due process clause of the Fourteenth Amendment, the state statute under which he was convicted did not give him fair warning that his actions were criminal. The defendant initially raised his due process claim in a motion for new trial and in a motion for demurrer filed with the trial court, which were denied. *Id.* at 287. When the defendant attempted to present the claim to the Georgia Supreme Court, the court held that any error in the denial of the motion for new trial could not be reviewed because it was not properly briefed for appeal. *Id.* This Court reached the merits of the defendant's claim, but before doing so it discussed why it had jurisdiction over the claim. *Id.* at 287-91. Although the Georgia Supreme Court apparently considered the defendant's due process claim in conjunction with its review of the denial of his motion for demurrer, this Court rested its jurisdiction on another basis. *Id.* at 287-89. Specifically, the Court held that the Georgia Supreme Court's procedural ruling was not an independent and adequate ground for its judgment and that the ruling could not serve to bar the Court's review. *Id.* at 291. The Court reached this

conclusion after finding that the procedural requirement the Georgia Supreme Court imposed on the defendant was apparent neither from the text of the rule in question nor from any Georgia precedent. *Id.* at 289-91. The Court noted that the inadequacy of the Georgia Supreme Court's ruling "is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of [the] requirement." *Id.* at 291.

Although *NAACP* and *Wright* did not invalidate the state court procedural rulings directly on due process grounds, the cases are nonetheless instructive. Each demonstrates that it is fundamentally unfair for a state supreme court to subject a litigant to the retroactive application of a newly recognized procedural rule of which it had no fair notice so as to deprive the litigant of the opportunity to secure appellate review of its substantive claims. Such unfairness arises even when a procedural ruling can be viewed as consistent with the deciding court's precedent. Indeed, the question is not whether the procedural ruling coheres with the court's past decisions but whether the court's precedent made the procedural ruling reasonably foreseeable to the litigant. *See NAACP*, 357 U.S. at 457.

Another doctrine utilized by this Court provides guidance in the instant case as well. When construing a statute, this Court presumes that the statute does not have retroactive effect "absent clear congressional intent favoring such a result." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Several principles support this presumption. Most basically, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265. The presumption also finds support in the due process clause, which "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.* at 266. As this Court

recently explained, "[t]he aim of the presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Republic of Austria v. Altmann*, 124 S.Ct. 2240, 2252 (2004). Although procedural rules do not affect primary conduct and may be applied to cases antedating their enactment, *see Landgraf*, 511 U.S. at 275, when a court adopts an unforeseeable procedural rule that is at odds with both the language of the rule and its own precedent, the principles of fair notice and reliance that animate the presumption against retroactivity should apply with equal force via the due process clause to prohibit the retroactive application of the unforeseeable rule.

B. The Interpretation of State Procedural Law Adopted and Applied Retroactively by the Supreme Court of Wyoming Was Unforeseeable.

The Supreme Court of Wyoming's decision in this case was novel and unforeseeable – and deprived Paxton of procedural due process. The court's decision was unforeseeable because it adopted an interpretation of a Wyoming procedural rule that conflicts with both the text of the rule and established Wyoming case law, and the interpretation of this rule denies Paxton due process because it has the effect of denying Paxton the opportunity to obtain appellate review of its substantive claims. No prior Wyoming case gave notice to Paxton that its post-trial motion would be deemed denied if not decided within 90 days and that it would be required to file a notice of appeal within the following 30 days, even though the district court entered an order prior to the deemed denied date scheduling a hearing on the motion. Instead, Paxton justifiably relied on both the text of the rules at issue and on the precedent of the Supreme Court of Wyoming – in addition to the actions of the trial court and the respondents – to conclude that the deemed denied rule did not apply to its motion and that the motion was not finally determined until the

district court entered its order denying the motion. Because the rule retroactively applied by the Supreme Court of Wyoming in the instant case was unforeseeable and because Paxton justifiably relied on the court's precedent in choosing its course of conduct, the state supreme court violated Paxton's Fourteenth Amendment right to due process in dismissing its appeal. Thus, this Court should grant Paxton's petition for a writ of certiorari, and the opinion and mandate of the state supreme court should be vacated and the case remanded to the state supreme court for further proceedings.

1. The Supreme Court of Wyoming's holding conflicts with the text of Rule 6(c) of the Wyoming Rules of Civil Procedure.

The text of the rule relied upon by the Supreme Court of Wyoming provides the first indication that its procedural ruling was novel and unforeseeable. The court's holding was based primarily on Rule 6(c)(2) of the Wyoming Rules of Civil Procedure – and the portion of that rule stating, "A motion not determined within 90 days after filing shall be deemed denied." WY. R. CIV. P. 6(c)(2). Because the district court did not determine Paxton's motion for a new trial, judgment, or remittitur within 90 days of its filing on February 25, 2003, the Supreme Court of Wyoming concluded that the motion was deemed denied at the end of this period. This conclusion can only be reached, however, if the sentence on which the court relied is viewed in isolation and out of context. When the clause is considered within the context of the provision in its entirety, the Supreme Court of Wyoming's error becomes apparent.

Rule 6(c)(2) of the Wyoming Rules of Civil Procedure, which pertains to the disposal of motions, states in its entirety,

> A request for hearing may be served by the moving party or any party affected by the motion within 30 days after service of the motion. ***Absent a timely request for hearing*** the court may, in its discretion, determine the motion without a hearing. A motion not determined within 90 days after filing shall be deemed denied. A party whose motion has been deemed denied shall have 10 days after the effective date of such denial to serve such pleadings or other papers, if any, as may be required or permitted.

WY. R. CIV. P. 6(c)(2) (emphasis added). The provision expressly limits the ability of Wyoming courts to determine motions without a hearing. Specifically, courts may do so only "[a]bsent a timely request for hearing" on the motion. It necessarily follows that, when (as here) a timely request for a hearing on a motion has been made, a court cannot determine the motion until it conducts a hearing. In other words, when a party has filed a timely request for a hearing, it is entitled to a hearing prior to the court's determination of the motion. The Supreme Court of Wyoming's holding that all motions are deemed denied if not determined within 90 days completely ignores the explicit right to a hearing granted by Rule 6(c)(2).

More importantly, when construed as a whole, Rule 6(c)(2) indicates that the 90-day deemed denied period does not apply to all motions regardless of whether a hearing on the motion has been requested. The sentences of the provision cannot be read in isolation but, instead, must be construed as interrelated parts. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 124 S.Ct. 1236, 1246 (2004) ("Statutory language must be read in context since a phrase gathers meaning from the words around it.") (alterations and quotations omitted); *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law . . . .").

Each sentence of Rule 6(c)(2) of the Wyoming Rules of Civil Procedure modifies the sentence that follows. *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase . . . ."); *cf. Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (alteration and quotation omitted). That is, the provision describes a progressive sequence of events as follows:

(1) Rule 6(c)(2) begins by stating that the moving party or a party affected by a post-trial motion may request a hearing on the motion within 30 days after the motion has been filed.

(2) The next sentence of Rule 6(c)(2) directly address the former sentence and explains that, when no such request for a hearing has been made, a court may determine a motion without conducting a hearing.

(3) The third sentence, in turn, describes only what occurs if a court that has discretion to determine a motion *without* a hearing fails to do so within 90 days; it is a general statement that follows a more specific statement and should be regarded as pertaining only to the specific instance described in the foregoing statement. *Cf. Adams*, 532 U.S. at 114-15. The sentence does not apply to those motions for which a timely request for a hearing has been made, which may only be determined by the court following a hearing.

(4) The final sentence in Rule 6(c)(2) then describes the rights of a party whose motion has been appropriately deemed denied.

The Supreme Court of Wyoming's conclusion that the 90-day deemed denied period pertains to all motions regardless of whether a request for a hearing has already been made, and granted, directly conflicts with this proper interpretation. Moreover, under the proper interpretation of Rule 6(c)(2) of the Wyoming Rules of Civil Procedure, Paxton filed its notice of appeal in a timely manner. On February 25, 2003, Paxton filed a timely motion for new trial, judgment, or remittitur, and likewise requested a hearing on the motion, App. 48-50, thereby entitling Paxton to a hearing on the motion prior to its determination. In furtherance of its obligations, the district court entered an order on March 31, 2003 – within the 90-day deemed denied period – setting a hearing on the motion for June 9, 2003. App. 16. The court conducted a hearing on that date, App. 54-59, and entered an order denying Paxton's motion on June 27, 2003. App. 17-18. At that time, the 30-day period for filing a notice of appeal began anew, *see* WY. R. APP. P. 2.01(a) & .02(b), and Paxton filed its notice of appeal within this time frame on July 3, 2003. App. 51-53. Hence, but for the Supreme Court of Wyoming's unforeseeable and unwarranted interpretation of state procedural law, Paxton's appeal would have been timely.

2. The Supreme Court of Wyoming's holding conflicts with and effectively overrules its own precedent.

As well as conflicting with the text of Rule 6(c)(2) of the Wyoming Rules of Civil Procedure, the Supreme Court of Wyoming's conclusion conflicts with a consistent line of its own precedent concerning when post-trial motions shall be deemed denied.

a. *Board of Commissioners v. Casper National Bank*

Beginning with *Board of Commissioners v. Casper National Bank*, 96 P.2d 564 (Wyo. 1939) and until the instant case, the Supreme Court of Wyoming has consistently refused under various iterations of Wyoming's rules of civil procedure to apply "deemed denied" provisions to post-trial motions for which either a hearing was conducted prior to the deemed denied date or for which an order setting a hearing on the motion was entered before that date. In fact, in *Casper* the court held that a deemed denied provision did not apply even though a hearing on the motion in question did not occur until after the deemed denied date and even though no formal order had been entered by that time that could be construed as extending the date.

The *Casper* district court entered judgment for the appellees on November 23, 1938. *Id.* The appellant filed a timely motion for a new trial, which the district court ultimately denied but not until more than 60 days after the motion was filed. *Id.* at 566. The appellant immediately appealed to the Supreme Court of Wyoming, before which the appellees argued that the appeal was untimely. *Id.* According to the appellees, the motion for new trial had been deemed denied prior to the district court's ruling pursuant to 1935 Wyo. Sess. Laws 112, which provided: "Motions for new trial shall be determined within sixty days after the rendition of judgment, and if not so determined shall be deemed denied, unless continued by order of the court, or by stipulation." *Id.* at 565. The appellees argued that the appellant failed to object properly at the time the motion was deemed denied as required by WY. R. CIV. P. 13 (1923) and that, consequently, the Supreme Court of Wyoming did not have jurisdiction to consider the appeal. *Id.* at 566.

The Supreme Court of Wyoming roundly rejected the appellees' argument. The court first held that, because a party cannot object precisely "at the time" a motion is

deemed denied, it would therefore treat deemed denied motions as if denied by regular court order and objected to in a proper manner. *Id.* at 567-68. The court also noted that the relevant parties attended a hearing on the motion the date the motion was expressly denied by the court – January 27, 1939 – and that the parties argued the merits of the motion without suggesting that it had already been denied. *Id.* at 568. As such, the court held that, by their actions, the parties waived the application of 1935 Wyo. Sess. Laws 112 and that it had jurisdiction to consider the appeal. *Id.* at 569. The court, quoting *Smith v. City of Nogales*, 211 P. 592, 593 (Ariz. 1923), stated, "[T]he denial of the motion by operation of law, unless continued by order of the court or by stipulation, being for the benefit of the party who obtained the judgment, may be waived by him, by stipulation . . . and that stipulation may be presumed from the fact that the parties have appeared and, without objection, . . . presented [the motion] on its merits in argument before submission to the court for decision." 96 P.2d at 569. The court further noted that "[i]t would be clearly unreasonable to hold that a party who has done everything possible for him to do is deprived of a right of review in this court because of the failure of the trial court to act seasonably." *Id.* at 568 (quoting *Borowicz v. Hamann*, 214 N.W. 431, 432 (Wis. 1927)). The Supreme Court of Wyoming's decision in this case is at odds with its decision in *Casper.*

b. *Brasel & Sims Construction Co. v. Neuman Transit Co.*

The Supreme Court of Wyoming again considered the impact of a deemed denied provision on its appellate jurisdiction in *Brasel & Sims Construction Co. v. Neuman Transit Co.*, 378 P.2d 501 (Wyo. 1963). In *Brasel*, the district court entered judgment against the defendant on May 23, 1961, on the basis of a jury verdict. *Id.* at 502. The defendant filed a timely motion for new trial and j.n.o.v. on May 29, 1961. *Id.* On June 29, 1961, the trial court issued

an order extending the time for deciding the motion until August 23, 1961. *Id.* The court subsequently conducted a hearing on the motion on August 21, 1961, and finally overruled the motion on October 11, 1961, beyond the extended date of determination. *Id.* The defendant then filed a notice of appeal on November 8, 1961. *Id.* On appeal, the plaintiff argued that the defendant's notice of appeal was untimely because, pursuant to the procedural rules then in effect, the motion was deemed denied 60 days after it was filed and defendant did not file its notice of appeal within 30 days of the deemed denied date as required. *Id.* The Supreme Court of Wyoming held that, since the rule of procedure at issue was unclear as to the effect of a continuance on the deemed denied provision and since "both court and counsel at the time of the hearing of the motion apparently proceeded as if the continuance was to be effective until the matter was resolved by the trial court," the motion was not denied until entry of the court's order on October 11, 1961, and the defendant's notice of appeal was therefore timely. *Id.* at 503.

What is most notable about *Brasel* is that the district court did not issue an order deciding the defendant's motion prior to its own extension date of August 23, 1961. Instead, the only action taken by the court on the motion by that date, other than to grant the extension, was to conduct a hearing. Yet, the Supreme Court of Wyoming did not find the motion to have been deemed denied. Rather, it accepted the October 11, 1961, order and the notice of appeal filed thereafter as valid. The implication of *Brasel*, then, is that a deemed denied provision does not apply to a post-trial motion when a district court conducts a hearing on the motion prior to the applicable deemed denied date, particularly if the parties and the court proceed as if the motion will not be disposed of until ruled upon by the court. The Supreme Court of Wyoming in the instant case effectively overruled *Brasel*, holding now that the only thing that matters is whether there has been a ruling before the "deem denied" period expires – not whether the

court has taken some action such as conducting a hearing on the motion.

c. *In re Estate of Potter*

Yet again in *In re Estate of Potter*, 396 P.2d 438 (Wyo. 1964), the Supreme Court of Wyoming demonstrated its reluctance to enforce a deemed denied provision so as to preclude appellate review. In *Potter*, the district court conducted a hearing on a motion for new trial before the applicable deemed denied date. *See id.* at 441. At the hearing, the court orally instructed the parties that it was denying appellants' motion, but the court did not actually enter a written order denying the motion until after the deemed denied date had passed. *See id.* Only after the entry of the written order did the appellants file their notice of appeal. *Id.* On appeal, the appellees argued that the motion had been deemed denied prior to the court's written order and that the appellants' notice of appeal was untimely because it was not filed within the appropriate time after this deemed denial. *Id.* The Supreme Court of Wyoming dismissed this notion, noting that the trial court obviously intended to continue the time for final determination of the motion until it entered its order. *Id.* at 441-42. Thus, *Potter* basically accords with *Brasel* by holding that a deemed denied date will not apply to a motion if a court conducts a hearing on the motion before that date and ultimately enters a written order ruling on the motion. Again, the Supreme Court of Wyoming's decision here conflicts with, and effectively overrules, this holding.

d. *Blake v. Rupe*

The Supreme Court of Wyoming most forcefully rejected an overly technical application of a deemed denied provision in *Blake v. Rupe*, 651 P.2d 1096 (Wyo. 1982). At issue in *Blake* was a prior version of Wyoming's deemed denied rule, which provided that all motions for judgment notwithstanding the verdict not determined within 60

days were deemed denied unless that 60-day period was continued by court order, provided that the continuance did not extend the deemed denied period beyond a total of 90 days. *Id.* at 1111. Another Wyoming rule applied an identical deemed denied scheme to motions for new trial. *Id.* The district court entered a judgment against the defendants on a jury verdict on April 27, 1981, after which the defendants filed a timely motion for judgment notwithstanding the verdict and new trial or remittitur on May 5, 1981. *Id.* On May 22, 1981 – *within the initial 60-day deemed denied period* – the district court filed a notice *sua sponte* setting a hearing on defendants' motion for June 29, 2004. *Id.* at 1111-12. The hearing took place on the assigned date, which was outside the initial 60-day period. *Id.* at 1112. At the hearing, the parties argued the merits of the motion and did not claim the motion had been deemed denied. *Id.* at 1112-13. The district court ultimately denied defendants' motion within the extended 90-day deemed denied period on July 10, 1981. *Id.* at 1112. The defendants filed a notice of appeal on July 23, 1981. *Id.*

On appeal, the Supreme Court of Wyoming addressed whether the notice of appeal was timely. More specifically, the court considered whether the defendants' motion had been deemed denied since it was not decided within 60 days and whether defendants' failure to file their notice of appeal within the next fifteen days, as then required, rendered it untimely. In addressing this issue, the court found that, by entering an order before the end of the initial 60-day period setting a hearing on the motion, the district court extended the time period for determining the motion to 90 days.[4] *Id.* at 1116. In other words, *Blake*

[4] A dissent suggested that the notice of setting was not filed pursuant to a proper order and hence could not serve to extend the deemed denied date. *Id.* at 1122-29 (Rose, C.J., dissenting). The majority rejected this contention on the ground that the court had

(Continued on following page)

expanded beyond *Brasel* to hold that the mere setting of a hearing on a motion prior to a deemed denied date avoids its effects. Since the hearing occurred and a determination on the motion was reached both within the 90-day period, the court concluded that defendants' motion was actually denied on July 10, 1981, and that defendants' notice of appeal was consequently timely. *See id.* at 1114-18.

In reaching this conclusion, the highest court of Wyoming noted, "We do not function for the purpose of demonstrating our authority and awesome power to wave a wand and make an appeal disappear, but exist to administer justice to those who come to settle their disputes." *Id.* at 1114. The court added, "It is judicially unbecoming to set traps for trial judges and counsel, and we should not construe our rules to reach that result." *Id.* at 1115. Yet, in this case, that is exactly what the Supreme Court of Wyoming did.

e. *Martinez v. City of Cheyenne*

Finally, and most recently, in *Martinez v. City of Cheyenne*, 791 P.2d 949 (Wyo. 1990), *overruled on other grounds by Beaulieu v. Florquist*, 86 P.3d 863, 868 (Wyo. 2004), the Supreme Court of Wyoming refused to use the deemed denied provision in the Wyoming rules to render a notice of appeal untimely. Judgment on a jury verdict was entered in *Martinez* on January 11, 1989. *Id.* at 953-54. Soon thereafter, the plaintiffs filed a motion for new trial, for which the deemed denied date was March 12, 1989. *See id.* at 954. If the motion were deemed denied, the last date to file a notice of appeal would be March 27, 1989. *Id.* On February 6, 1989, the district court entered an order setting a hearing on the motion for March 9, 1989. *Id.* The parties were later notified by the trial judge's secretary before the deemed denied date that the hearing was

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ordered a hearing and that the clerk's notice merely conveyed this order to the parties. *Id.* at 1116-17.

cancelled; it was never rescheduled. *Id.* at 955. Nor was any formal order of continuation filed. *Id.* After March 27, 1989, the plaintiffs filed several motions for extensions of time to appeal, which were granted. *See id.* at 954-55. Yet, under the strict application of the rules of civil procedure, the plaintiffs' motion for a new trial had already been deemed denied and the date for filing a notice of appeal had passed before the grant of any of these extensions. *Id.* The plaintiffs did not file a notice of appeal until May 10, 1989. *See id.* at 955.

Nonetheless, the Supreme Court of Wyoming held in *Martinez* that the cancellation of the hearing continued the time of determination of the motion and that the subsequent extensions of time served to save plaintiffs' notice of appeal such that it was timely. Hence, *Martinez* builds upon *Brasel* and *Blake* to hold that the setting of a hearing on a post-trial motion prior to the applicable deemed denied date makes the date inapplicable, *even if the hearing is cancelled prior to the deemed denied date.*

C. THE SUPREME COURT OF WYOMING'S EFFORTS TO JUSTIFY THE NEW, HARSH RULE IT ANNOUNCED AND RETROACTIVELY APPLIED HERE CANNOT BE SQUARED WITH PRECEDENT OR WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The common principle that runs through each of the Wyoming cases discussed above is that deemed denied provisions of the Wyoming civil procedure rules have never been applied (before now) to post-trial motions on which some formal action has been taken by a district court before the deemed denied date, such as conducting a hearing or entering an order setting a hearing date. The cases further instruct that, when formal action has been taken on a post-trial motion by a court before the deemed denied date, the time for appealing the motion and the

underlying judgment shall run from the date the court enters an order on the motion.

The Supreme Court of Wyoming attempted to distinguish this line of cases from the instant case on the ground that continuances of deemed denied dates were permitted under the rules at issue in those cases, whereas "the present version of the 'deemed denied' rule does not allow for continuances." *Paxton*, 95 P.3d at 800. This distinction fails.

First, contrary to the Supreme Court of Wyoming's statement, a deemed denied date may be postponed under the current version of Wyoming's rules of civil procedure. *See* WY. R. CIV. P. 6(b) ("When by these rules . . . an act is required or allowed to be done at or within a specified time, the court . . . for cause shown may at any time in its discretion [] with or without motion or notice order the period enlarged. . . ."); *see also* WY. UNIF. R. DIST. CTS. 202 ("[T]ime limits permitted or required by rules may not be extended or modified by agreement of counsel, but *only by order*.") (emphasis added).

Second, even accepting the Supreme Court of Wyoming's statement as correctly characterizing Wyoming law, the court's opinion in the instant case nonetheless violates Paxton's due process rights. Paxton had no fair notice that its post-trial motion would be deemed denied when, as here, the hearing was set and held within the 90-day "deemed denied" period and both the parties and the district court acquiesced in the procedure followed in the district court. Indeed, Paxton justifiably relied on the Supreme Court of Wyoming's precedent in believing that its motion would not be deemed denied once a hearing was set and that its time for filing a notice of appeal would run from the date the district court entered an order ruling on Paxton's post-trial motion. The fact that the state supreme court found a way to distinguish its decision in the instant case from its precedent to reach a contrary result does not justify the retroactive application of its holding to Paxton. *Cf. NAACP*, 357 U.S. at 457 ("[A] local procedural rule,

although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence.").

Decisions of the Supreme Court of Wyoming actually finding post-trial motions to have been deemed denied only serve to support the conclusion that Paxton justifiably relied on the court's precedent in believing that its motion had not been deemed denied and that its notice of appeal was timely. Before this case, the Supreme Court of Wyoming had applied deemed denied provisions to motions so as to preclude appellate review only when (1) no hearing on the motion had been conducted prior to the deemed denied date and (2) no order scheduling a hearing on the motion had been entered by that date. *See Johnson v. Hauffe*, 567 P.2d 735 (Wyo. 1977); *McMullen v. McMullen*, 559 P.2d 37 (Wyo. 1977); *Sun Land & Cattle Co. v. Brown*, 387 P.2d 1004 (Wyo. 1964). Of course, such was not the case here, as the district court entered an order prior to the deemed denied date setting a hearing on Paxton's motion.

Although not directly on point, several other decisions of the Supreme Court of Wyoming further demonstrate that Paxton's reliance was justified and that the court's judgment in the instant case constitutes a sharp, unforeseeable deviation from its own precedent. In *Harris v. Taylor*, 969 P.2d 142, 144 (Wyo. 1998), the court addressed the merits of a grant of a motion for summary judgment even though the motion was decided beyond the deemed denied date. The *Harris* court also excused the appellant's failure to file a timely notice of appeal after the deemed denied date because of the "special circumstance[] where summary judgment is entered against a nonmovant after the time has passed when the motion is deemed denied" and because of a clerical error of the court. *Id.* The court addressed the merits of an appeal even though a timely notice of appeal was not filed again in *Caterpillar Tractor*

Co. v. Donahue. 674 P.2d 1276, 1290-91 (Wyo. 1983) (Rooney, J., dissenting) (noting that appeal should have been dismissed as untimely). The court has even held that a district court's failure to determine a motion and to instead allow the motion to be deemed denied constituted an abuse of discretion. *Randolph v. Hays*, 665 P.2d 500, 503 (Wyo. 1983). Finally, in the criminal context, the Wyoming Supreme Court has assumed that an order setting a hearing on a motion extended the period during which the court could determine the motion beyond the deemed denied date. *Murry v. State*, 631 P.2d 26, 28 (Wyo. 1981).

A final factor supporting the conclusion that Paxton justifiably believed its post-trial motion was not deemed denied and that the Supreme Court of Wyoming's contrary conclusion was unforeseeable is that numerous of the court's decisions have looked to the conduct of the district court and the parties to determine whether a motion should be deemed denied. In *Casper*, the court justified its holding by noting:

> [I]t would appear with reasonable clarity that the parties themselves have waived any operation on the part of the 1935 statute. . . . Undoubtedly they could do so by formal stipulation continuing the hearing. We are inclined to think they accomplished the same result when they appeared and argued these motions for a new trial upon their merits and thereby invoked the court's rulings thereon.

96 P.2d at 569. The *Brasel* court noted that "both court and counsel at the time of the hearing of the motion apparently proceeded as if the continuance was to be effective until the matter was resolved by the trial court," on which basis it determined that "the motion to dismiss [the appeal] must be overruled." 378 P.2d at 503. In *Potter*, the court concluded that, by their actions, the parties agreed with the court to continue determination of the motion in question until the court entered an order on the motion.

396 P.2d at 441-42. *Blake* involved "evidence of a continuance not only by conduct but by express order of the district court." 651 P.2d at 1114. The court set a hearing to be conducted after the deemed denied date and "[t]he parties certainly treated the notice of setting as an order of the court because both sides filed preargument briefs and were present in accordance with the direction of the notice." *Id.* at 1116. And in *Martinez*, the defendants, after the deemed denied date passed, "contested matters without asserting any objections on the basis of lack of jurisdiction" and "[b]oth parties considered the [plaintiff's] motion as undisposed of, and both parties treated the situation as one in which the determination by the district court had been continued." 791 P.2d at 956.

Each of these cases indicated to Paxton that it could look to the actions of the court and the respondents to determine whether its motion was still pending. Moreover, the actions of the court and the respondents demonstrated to Paxton that his motion had not been deemed denied but was pending until the district court's order denying the motion. The district court in the instant case entered an order before the deemed denied date setting a date for hearing. App. 16. Prior to the hearing, Paxton and the respondents filed briefs on the merits of the motion. They attended the hearing and argued the merits of the motion. During the course of the hearing, the court indicated numerous times that its decision on the motion was subject to appeal. For instance, the court stated, "[I]t appears to me as though an appeal is inevitable," App. 55, "[N]o matter what I say the Supreme Court [of Wyoming] is going to review the record that was created at trial again," App. 56, "I'm really prepared to let that [issue] go to appeal," App. 57, "I think that's a good issue for the folks upstairs to resolve for us all," App. 58, and, to the respondents, "[I]f you'd do a one-page Minute Order, I

think you can get your time for appeal started."[5] App. 59. At no point prior to its order denying the motion did the court suggest that the motion had been deemed denied. Nor did the respondents argue in the trial court that Paxton's post-trial motion had been deemed denied at any time prior to the court's order. In fact, respondents did not raise this issue until their motion with the Supreme Court of Wyoming to dismiss Paxton's appeal.

In sum, the Supreme Court of Wyoming's procedural ruling in the instant case was not foreseeable from its prior decisions. Quite the contrary, the court's precedent provided every indication to Paxton that "deemed denied" rules would not apply to post-trial motions on which a district court had taken some formal action before the applicable deemed denied date. Paxton justifiably relied on this precedent in believing that the time for filing a notice of appeal would run from the entry of the district court's order expressly denying its post-trial motion, and Paxton acted accordingly, with the acquiescence of the trial court and respondents.

II. COMPELLING REASONS SUPPORT THE GRANT OF PAXTON'S PETITION FOR A WRIT OF CERTIORARI.

Aside from the merits of petitioner's claim, compelling reasons exist to grant a writ of certiorari in this case. The Supreme Court of Wyoming violated petitioner's Fourteenth Amendment right to due process by adopting and applying retroactively an unforeseeable interpretation of

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[5] The district court indicated at the end of the hearing that it would deny Paxton's motion, App. 59, but respondents did not provide a draft order to Paxton for review until June 20, 2003. Paxton objected to the form of the order and proposed its own order, to which respondents agreed and which the trial court eventually entered on June 27, 2003. App. 17-18.

Wyoming state procedural rules with the effect of precluding petitioner from obtaining any substantive appellate review of an adverse judgment that will deprive it of $810,887.00. In other words, if the Supreme Court of Wyoming's judgment is allowed to stand, petitioner will be deprived of property without being afforded due process. The only venue in which petitioner can secure redress for this constitutional injury is this Honorable Court. Additionally, this case is exceptional in that the due process violation has been committed by a court of law, indeed the highest court of the State of Wyoming. This case thus presents a substantial federal question regarding the due process that must be provided by state supreme courts, a question that can only be, and should be, settled by this Court. *See* SUP. CT. R. 10(c).

CONCLUSION

In holding that, under Rule 6(c)(2) of the Wyoming Rules of Civil Procedure, a motion is deemed denied 90 days after it has been filed if no determination has yet been made on that motion and regardless of whether a hearing has been scheduled on the motion, the Supreme Court of Wyoming adopted an interpretation of the Wyoming rules of civil and appellate procedure that conflicts with the language of those rules and with its own precedent. Based on the text of those rules and on this precedent, Paxton justifiably believed that it was entitled to a hearing on its post-trial motion and that its time for appealing the denial of the motion and the underlying judgment would run from the entry of the district court's order denying the motion. Moreover, the Supreme Court of Wyoming applied this interpretation retroactively to Paxton to dismiss as untimely its appeal of a state trial court judgment. In doing so, the court denied Paxton of the opportunity to obtain the only appellate review of that state trial court judgment available under Wyoming law. As a result, the state trial court's judgment stands and

will deprive Paxton of $810,887.00. Hence, the Supreme Court of Wyoming's opinion effectively deprives Paxton of a property interest without due process of law. For these reasons, petitioner Paxton Resources, L.L.C., respectfully prays that this Honorable Court grant a writ of certiorari and review the judgment of the Supreme Court of Wyoming.

Respectfully submitted,

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IN THE SUPREME COURT,
STATE OF WYOMING

2004 WY 93

APRIL TERM, A.D. 2004

AUGUST 12, 2004

PAXTON RESOURCES, L.L.C., Appellant (Defendant), v. DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN, Appellees (Plaintiffs).	No. 03-143
DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN, Appellants (Plaintiffs), v. PAXTON RESOURCES, L.L.C., Appellee (Defendant).	No. 03-144

Appeals from the
District Court of Sheridan County
The Honorable John C. Brackley, Judge

Representing Paxton Resources, L.L.C.:

Kevin D. Huber, Richard Day and P. Craig Silva of Williams, Porter, Day & Neville, P.C., Casper, Wyoming

Representing Dan M. "Buck" Brannaman and Mary C. Brannaman:

Jay A. Gilbertz and Michael K. Davis of Yonkee & Toner, LLP, Sheridan, Wyoming.

Before HILL, C.J., and GOLDEN, LEHMAN, KITE, and VOIGT, JJ.

VOIGT, Justice delivered the majority opinion; HILL, Chief Justice, filed a specially concurring opinion.

VOIGT, Justice.

[¶1] Dan M. "Buck" Brannaman and Mary C. Brannaman (the Brannamans) sued a coalbed methane gas developer, Paxton Resources, L.L.C. (Paxton), for damages to their real property and for lost income. The complaint stated causes of action for breach of contract, breach of the duty of good faith and fair dealing, trespass and negligence, and sought a declaratory judgment and punitive damages. A jury awarded the Brannamans compensatory damages of $810,887.00 for Paxton's breach of contract and breach of the duty of good faith and fair dealing. Paxton appealed the judgment and the district court's denial of its W.R.C.P. 50 and 59 motions for judgment as a matter of law, for new trial, and for remittitur. The Brannamans appealed the district court's dismissal of their trespass and punitive damages claims.

[¶2] We dismiss the appeal and cross appeal because they were not timely filed.

ISSUES

1. Should this appeal be dismissed because it was not timely filed?

2. Did the district court err in refusing to give to the jury Paxton's proposed damages instruction?

3. Did the district court abuse its discretion by refusing to allow Paxton's expert witness to testify at trial?

4. Was there sufficient evidence to support the jury's finding that Paxton breached the contract?

5. Did the district court abuse its discretion by denying Paxton's motion for remittitur?

6. Did the district court abuse its discretion by denying Paxton's motion for a new trial?

FACTS

[¶3] The relevant facts are those having to do with the chronology of procedural events after the jury trial:

February 7, 2003	Jury verdict
February 25, 2003	Post-trial motions filed
February 26, 2003	Judgment entered
March 31, 2003	Order setting hearing entered
June 9, 2003	Hearing on post-trial motions
June 27, 2003	Order denying post-trial motions entered
July 3, 2003	Paxton's notice of appeal filed
July 11, 2003	Brannamans' conditional notice of appeal filed

DISCUSSION

[¶4] The interplay of several court rules dictates the outcome of this case. To begin with, W.R.A.P. 2.01(a)

provides that "[a]n appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order. . . . " Subsection (a)(2) of the same section goes on to provide that "[i]f a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 15 days of the date on which the first notice of appeal was filed." Of particular significance to the present case is the exception to these time limitations found in W.R.A.P. 2.02:

> (a) The running of the time for appeal in a civil case is tolled as to all parties by the timely filing of a motion for judgment under Rule 50(b), Wyo. R. Civ. P.; a motion to amend or make additional findings of fact under Rule 52(b), Wyo. R. Civ. P., whether or not alteration of the judgment would be required if the motion is granted; a motion to alter or amend the judgment under Rule 59, Wyo. R. Civ. P., or a motion for a new trial under Rule 59, Wyo. R. Civ. P.
>
> (b) The full time for appeal commences to run and is to be computed from the entry of any order granting or denying a motion for judgment; a motion to amend or make additional findings of fact; or a motion to alter or amend the judgment, or denying a motion for a new trial. ***If no order is entered, the full time for appeal commences to run when any such motion is deemed denied.***

(Emphasis added.)

[¶5] W.R.C.P. 6(c)(2) governs the district court's hearing of such motions:

> A request for hearing may be served by the moving party or any party affected by the motion

> within 30 days after service of the motion. Absent a timely request for hearing the court may, in its discretion, determine the motion without a hearing. ***A motion not determined within 90 days after filing shall be deemed denied.*** A party whose motion has been deemed denied shall have 10 days after the effective date of such denial to serve such pleadings or other papers, if any, as may be required or permitted.

(Emphasis added.) And finally, the Wyoming Rules of Appellate Procedure spell out the consequences of an appeal being filed "too early" or "too late." Under W.R.A.P. 2.04, "[a] notice of appeal filed prematurely shall be treated as though filed on the same day as entry of the appealable order. . . ." On the other hand, W.R.A.P. 1.03 specifies that "[t]he timely filing of a notice of appeal . . . is jurisdictional."

[¶6] The following sequence of events sets the stage for our inquiry: the motions were filed, judgment was entered, the order setting the motions for hearing was entered, the ninety-day "deemed denied" date passed, the hearing was held, the thirty-day appeal deadline after the "deemed denied" date passed, the order denying the motions was entered, the notice of appeal was filed. There is no dispute that the appeal was filed more than thirty days after the "deemed denied" date. The sole question is whether the district court's entry of the setting order during the ninety-day period acted to toll the time for appeal or acted as a determination of the motions.

[¶7] Wyoming's case law in this area must be read in the context of the rules in effect at the time. In *Brasel & Sims Const. Co. v. Neuman Transit Co.*, 378 P.2d 501, 502-03 (Wyo.1963), this Court denied a motion to dismiss the

appeal where the appellee argued that the notice of appeal had not been filed within the time required by former W.R.C.P. 59(f) (1966), which provided as follows:

> Motions for new trial and motions to alter or amend a judgment shall be determined within sixty days after the entry of the judgment, and if not so determined shall be deemed denied, unless within such sixty days the determination is continued by order of the court or by stipulation.

[¶8] Clearly, the rule as then incarnated provided methods for the parties and the district court to delay determination of such motions beyond the "deemed denied" date. In *Brasel & Sims Const. Co.*, we concluded that the district court and the parties had proceeded as if the court's order, issued at a party's request, extending the time for determination of the motion apparently was to be effective "until the matter was resolved by the trial court." *Id.* at 503. We further opined, however, that "a lack of clarity of Rule 59(f), Wyoming Rules of Civil Procedure, might well be contended because there is no provision as to what occurs after the continuance therein provided." *Id.*

[¶9] In *McMullen v. McMullen*, 559 P.2d 37, 38 (Wyo. 1977), under the same version of the court rule, this Court dismissed an appeal as untimely because it had not been filed within thirty days after a motion for mistrial was deemed denied, and no extension of time for the motion's determination had been ordered by the district court or stipulated to by the parties. A similar result obtained in *Johnson v. Hauffe,* 567 P.2d 735, 736 (Wyo. 1977), where we further held that "entry of a written order denying Rule 59 motions after they have been deemed denied does not extend the time for appeal[.]"

[¶10] In 1978, W.R.C.P. 59(f) was amended to read as follows:

> Motions for new trial and motions to alter or amend a judgment shall be determined within 60 days after the entry of the judgment, and if not so determined shall be deemed denied, unless within such 60 days the determination is continued by order of the court, but a continuance shall not extend the time to a day more than 90 days from the date of entry of judgment.

This new version of the rule was applied in *Blake v. Rupe*, 651 P.2d 1096 (Wyo. 1982), *cert. denied*, 459 U.S. 1208 (1983). In *Blake,* the district court clerk, during the sixty-day period, issued a notice setting the post-trial motions for hearing on a date outside the sixty-day period, but within the ninety-day period. *Id.* at 1111-12. The hearing was held, no party objected to the lack of a formal order of continuance, and the district court, also within the ninety-day period, issued an order denying the motions. *Id.* In a 3-2 split, the majority of this Court held that the parties and the district court treated the notice of setting as if it were an order of extension under W.R.C.P. 59(f), and thus, the appeal was timely. *Blake,* 651 P.2d at 1113. In separate dissents, Justice Thomas and Chief Justice Rose decried the use of a "legal fiction" to salvage an untimely appeal. *Id.* at 1121-22, 1122-29. We relied upon and expanded the holding of *Blake* in *Martinez v. City of Cheyenne,* 791 P.2d 949, 955-56 (Wyo. 1990), *rev'd on other grounds by Beaulieu v. Florquist,* 2004 WY 31, 86 P.3d 863 (Wyo. 2004), where we held that a telephone call from the district judge's secretary vacating a motion hearing setting, later sanctified by an order *nunc pro tunc,* was sufficient to act as an order of the court under W.R.C.P.

59(f), where the district court and the parties treated it as such.

[¶11] Long ago, we identified the purpose behind the "deemed denied" concept:

> Statutes of this kind in substance have been enacted in a number of States of the Union, and, without undertaking to be exhaustive, we may mention the commonwealths of Montana, California, Oregon, Wisconsin, Arizona, Alabama and Colorado. The enactment of such laws is evidently with the idea of expediting court business and preventing trial judges from keeping motions for new trial under advisement for an unreasonable length of time. Statutes of this character have generally been held to be mandatory.

Board of Com'rs of Natrona County v. Casper Nat. Bank, 55 Wyo. 144, 96 P.2d 564, 566 (1939).[1] Undoubtedly, it is the desire to achieve this purpose that has caused periodic amendment of the rule. Initially, the period for determination of a motion for new trial could be continued by court order or stipulation of the parties, and there was no apparent limit to that continuance. The 1978 amendment added motions to alter or amend a judgment, thereby extending application of the "deemed denied" concept, deleted the provision for continuance by stipulation, and limited any continuance to ninety days after entry of the

[1] Wyoming's "deemed denied" rule was originally enacted as a statute:

> Motions for new trial shall be determined within sixty days after the rendition of judgment, and if not so determined shall be deemed denied, unless continued by order of the court, or by stipulation.

Wyo. Sess. Laws ch. 112 at 158 (1935).

judgment. The present version of the rule, now found at W.R.C.P. 6(c)(2), in combination with W.R.A.P. 2.02, both of which are set forth in full hereinabove, covers motions for judgment, motions to amend or make additional findings of fact, motions to alter or amend a judgment, and motions for new trial, once again broadening the application of the "deemed denied" principle. Further, the present rule sets the "deemed denied" date at ninety days after filing of the motion and contains ***no*** provision for continuance, which indicates a firm commitment to the rule's purpose of preventing delay in the determination of post-trial motions.

[¶12] This is the context in which we must evaluate the legal effect of the post-trial events in the present case. Paxton contends that its motions were never deemed denied because, as in *Brasel & Sims Const. Co., Blake*, and *Martinez,* the parties and the district court treated the order setting the hearing as a continuance. Second, Paxton contends that, by not objecting to the setting date, the Brannamans waived their "deemed denied" argument. And third, Paxton contends that the order of setting satisfies W.R.A.P. 2.02's provision that the time for appeal commences to run when a motion is deemed denied only if "no order is entered. . . ."

[¶13] We find these contentions unpersuasive. To begin with, the present version of the "deemed denied" rule does not allow for continuances, making *Brasel & Sims Const. Co., Blake*, and *Martinez* irrelevant in that respect. Furthermore, while the right to object to a continuance under the former rules could be waived without affecting subject matter jurisdiction, the same is not true under the present rule, where there is no continuance provision. In other words, under the former versions of the rule, the time for filing an appeal could be tolled by stipulation of the parties

or by court order. If such a continuance occurred because the movant's opponent did not object, the appeal remained timely, and subject matter jurisdiction was not offended. That process no longer exists.

[¶14] Paxton's final argument – that the order of setting was an order that was entered within the meaning of the last sentence of W.R.A.P. 2.02(b) – simply defies the sense and purpose of the rule. The previous sentence of W.R.A.P. 2.02(b) specifies orders granting or denying the subject motions. Clearly, it is these orders to which the second sentence refers. Otherwise – if any order would suffice – the rule's purpose would be thwarted; the motion might never be heard or decided, yet neither the "deemed denied" period nor the time for appeal would ever begin. Such an interpretation would also fly directly in the face of the specific wording of the "deemed denied" provision; that is, a motion is deemed denied if is not ***determined*** within the specified time. Something is "determined" within the meaning of the law when a final decision has been made by the court. *Black's Law Dictionary* 480 (8th ed.2004). The word "determine" means "to decide, to adjudicate, to come to a decision, to decide upon an investigation, to perform a judicial act." *Swift v. Smith,* 119 Colo. 126, 201 P.2d 609, 614 (1948).[2]

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[2] In Oregon, where a court rule requires similar post-trial motions to be " 'heard and determined by the court within 55 days from the time of the entry of the judgment,' " a motion is not determined until actual entry in the trial court register of a written order disposing of the motion. *Ryerse v. Haddock,* 185 Or.App. 679, 60 P.3d 1107, 1109-10 (2003) (*quoting* ORCP 64 F); *Matter of Marriage of Conley,* 97 Or.App. 134, 776 P.2d 860, 861 (1989). The court in *Matter of Marriage of Conley* explained that, if a motion was determined by a mere verbal decision from the bench, the "deemed denied" provision would never come into

(Continued on following page)

[¶15] As we stated earlier herein, the timely filing of a notice of appeal is jurisdictional. W.R.A.P. 1.03. We have steadfastedly held to that principle, and to the concomitant principle that dismissal must befall an untimely appeal. *TPJ v. State,* 2003 WY 49, ¶ 13, 66 P.3d 710, 713 (Wyo. 2003); *Cosco v. Uphoff,* 2003 WY 30, ¶ 4, 66 P.3d 702, 703 (Wyo.), *cert. denied,* 124 S.Ct. 121 (2003); *Harding v. Glatter,* 2002 WY 124, ¶ 10, 53 P.3d 538, 540 (Wyo. 2002); *Tusshani v. Allsop,* 1 P.3d 1263, 1265 (Wyo. 2000); *Miller v. Murdock,* 788 P.2d 614, 616 (Wyo. 1990); *Wiens v. American Motors Corp.,* 717 P.2d 322, 323 (Wyo. 1986); *State v. Berger,* 600 P.2d 708, 709 (Wyo. 1979); *Johnson,* 567 P.2d at 736; *McMullen,* 559 P.2d at 38; *Jackson v. State,* 547 P.2d 1203, 1205 (Wyo. 1976).

[¶16] Court rules have the force and effect of law and are construed in the same manner as statutes. *Vanasse v. Ramsay,* 847 P.2d 993, 999 (Wyo.1993) (*quoting Lapp v. City of Worland,* 612 P.2d 868, 874-75 (Wyo.1980)). Compliance with court rules is mandatory. *Matter of Estate of Obra,* 749 P.2d 272, 275 (Wyo.1988); *Greenwood v. Wierdsma,* 741 P.2d 1079, 1084 (Wyo.1987) (*quoting Hickey v. Burnett,* 707 P.2d 741, 745 (Wyo.1985)). In particular,

> "[T]he error of the trial judge in entertaining the motions could not be validated by the acquiescence of the [other party]. It is elementary that the parties cannot confer jurisdiction on the court.
>
> We have said that untimely motions * * * for new trial are of no legal significance whatsoever

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effect, even if there was a failure to enter the final decisional order, thereby defeating the purpose of the rule. *Matter of Marriage of Conley,* 776 P.2d at 861.

> because the limiting language of Rule 6(b) is 'mandatory and jurisdictional and [can]not be extended regardless of excuse.' . . . In my view we should abide by these rules or amend them, rather than emasculate them.
>
> Rules of procedure are a necessary part of an orderly system of justice. Their efficacy, however, depends upon the willingness of courts to enforce them according to their terms."

Miller, 788 P.2d at 616-17 (*quoting Thompson v. Immigration and Naturalization Service,* 375 U.S. 384, 389, 84 S.Ct. 397, 400, 11 L.Ed.2d 404, 407 (1964) (Clark, J. dissenting)).

[¶17] In other states with similar rules, courts are not hesitant to dismiss appeals rendered untimely by a "deemed denied" provision. *See, for example, Bombardier Capital, Inc. v. Williams,* 850 So.2d 363, 364 (Ala. Civ. App. 2002); *Freiberg v. City of Mission Viejo,* 33 Cal.App.4th 1484, 39 Cal.Rptr.2d 802, 805 (1995); *Barker Phillips, Inc. v. Caviness,* 603 S.W.2d 715, 715 (Mo. App. 1980); *Beneficial Finance Corp. v. Morris,* 120 N.M. 228, 900 P.2d 977, 978 (1995); and *Minor v. Leisure Lodge, Inc.,* 154 Or.App. 301, 961 P.2d 915, 916-17 (1998). While such may seem harsh, it must be remembered that litigants may protect themselves against dismissal for late filing by filing "prematurely," a practice authorized by W.R.A.P. 2.04. Furthermore, "'[t]he first and fundamental question on every appeal is that of jurisdiction; this question cannot be waived; it is open for consideration by the reviewing court whenever it is raised by any party, or it may be raised by the court of its own motion.'" *Wyoming Community College Com'n v. Casper Community College Dist.,* 2001 WY 86,

¶ 12, 31 P.3d 1242, 1247-48 (Wyo. 2001) (*quoting Hirschfield v. Board of County Com'rs of County of Teton,* 944 P.2d 1139, 1141 (Wyo. 1997)). The timeliness of an appeal being jurisdictional, we cannot simply enforce or ignore the rule as we choose.

CONCLUSION

[¶18] The whole point of a "deemed denied" provision is that the judgment ***automatically*** becomes final and appealable upon passage of the specified period. *Sun Land & Cattle Co. v. Brown,* 387 P.2d 1004, 1006 (Wyo. 1964). Therefore, an appeal that is not filed within thirty days after the post-trial motions are deemed denied is untimely. In the present case, the motions were deemed denied before the district court heard and purported to determine them. The judgment had become final and appealable at the time the motions were deemed denied and the district court no longer had jurisdiction to determine the motions. Indeed, the district court's order denying the motions was entered one day after the thirty days allowed for appeal under W.R.A.P. 2.01.[3]

[¶19] This appeal is untimely and is, therefore, dismissed, as is the Brannamans' conditional appeal.

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[3] The post-trial motions were filed on February 25, 2003, and were deemed denied on May 27, 2003. The thirty-day appeal period ended on June 26, 2003, and the denial order was entered on June 27, 2003.

HILL, Chief Justice, specially concurring.

[¶20] The application of W.R.C.P. 6(c)(2) in these circumstances is, without a doubt, harsh and predecessors of that rule have had similarly harsh impacts on litigants in the past. There are precedents from which we might have tailored a less unforgiving imperative than that set out in the majority opinion. *See, e.g., Blake v. Rupe,* 651 P.2d 1096, 1115 (Wyo. 1982). However, it does appear that that was the clear intent of the authors of the most recent version of the "deemed denied" rule, and practitioners could discern that. As written, the rule makes no mention of a continuance, whether in written form or as it might be gleaned from tacit material.

[¶21] I concur with the result reached by the majority opinion because adoption of a "tacit" exception to the deemed denied rule would result in the same old uncertainty that used to exist. I take some solace from the harshness of this result in my conviction that, having carefully reviewed the merits of all issues raised by Paxton, this Justice would have held for Brannaman in this appeal in any event.

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 2004

PAXTON RESOURCES, L.L.C., v. DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN
and
DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN v. PAXTON RESOURCES, L.L.C.

Case Nos. 03-143, 03-144 (Your Civil C02-2-47)

MANDATE DISMISSING APPEALS

The referenced causes were taken under advisement and the opinion of this Court was delivered on August 12, 2004, dismissing the appeals for failure to invoke the jurisdiction of this Court. Therefore, in accordance with WYO.R.APP.P. 9, it is,

ORDERED that the appeals are dismissed and the judgment of the Fourth Judicial District Court, Sheridan County, Wyoming, remains in full force and effect. Each party shall bear its own costs. The decision of this Court shall be carried into execution and given full effect without delay.

DATED this 8th day of September, 2004.

FOR THE COURT:

Judy Pacheco
Clerk of Court

/s/ Carol Thompson

By Deputy

District Court of the State of Wyoming
Fourth Judicial District, Sheridan County

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN, Plaintiffs, vs. PAXTON RESOURCES, L.L.C. Defendant.	C02-2-47

ORDER FOR SETTING

(Filed March 31, 2003)

IT IS HEREBY ORDERED that the following motions filed in the above-entitled matter are set for hearing on the **9th day of June, 2003, beginning at 8:30 a.m.:**

(1) Defendant's Motion to Stay Enforcement of Judgment;

(2) Defendant's Pax Resources, L.L.C.'s Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial or Remittitur; and

(3) Plaintiff's Motion for Supersedeas Bond.

Dated this 31 day of March, 2003.

/s/ J. Brackley/ll
John C. Brackley, District Judge

Copies to:

Gilbertz/Davis
Huber/Silva

STATE OF WYOMING) IN THE DISTRICT COURT
) SS
COUNTY OF SHERIDAN) FOURTH JUDICIAL DISTRICT

Civil No. C02-2-47

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN,

Plaintiffs,

vs.

PAXTON RESOURCES, L.L.C.,

Defendant.

ORDER DENYING DEFENDANT'S MOTIONS FOR DIRECTED VERDICT, NEW TRIAL, REMITTITUR AND SUPPLEMENTAL ISSUE ON NEWLY DISCOVERED EVIDENCE.

(Filed June 27, 2003)

THIS MATTER came before the Court on June 9, 2003, the Court heard arguments and the Court finding that Defendant's Motion for a Directed Verdict, Defendant's Motion for a New Trial, Defendant Paxton Resources, L.L.C.'s Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial or Remittitur, and the Supplemental Issue Regarding Newly Discovered Evidence should all be denied;

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for a Directed Verdict, Defendant's Motion for a New Trial, Defendant Paxton Resources, L.L.C.'s Motion for Judgment as a Matter of Law or in the Alternative Motion for New Trial or Remittitur, and the Supplemental Issue Regarding Newly Discovered Evidence are all denied.

Dated this 27 day of June, 2003.

BY THE COURT:

/s/ J. Brackley
JUDGE

Approved as to form:

/s/ Michael Davis
Michael Davis
Attorney for Plaintiff

/s/ P. Craig Silva
P. Craig Silva
Attorney for Defendant

RECORDED FEBRUARY 26, 2003 BK 24 PG 366
NO 433236 AUDREY KOLTISKA, COUNTY CLERK

IN THE DISTRICT COURT OF THE FOURTH
JUDICIAL DISTRICT WITHIN AND
FOR SHERIDAN COUNTY, WYOMING

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN Plaintiffs, vs. PAXTON RESOURCES, L.L.C. Defendant.	)	Civil Action No. C02-2-47

JUDGMENT
(Filed Feb. 26, 2003)

This action came before the Court on a trial by jury on February 3rd through the 7th 2003. The jury, found the Defendant breached its contract with the Plaintiffs and that the Defendant violated the covenant of good faith and fair dealing implied in the contract between the parties. The jury rendered a verdict in favor of the Plaintiffs, and found the Plaintiffs had suffered the following damages as reflected on the Special Verdict form:

1. Cost of repair to real property	$515,637.00
2. Lost revenue from horsemanship clinics	$238,750.00
3. Lost revenue from cattle operations	$ 37,800.00
4. Weed spraying expense:	$ 2,500.00
5. Contract payments due:	$ 16,200.00
6. **TOTAL**	**$810,887.00**

WHEREFORE, the Court hereby enters judgment in favor of the Plaintiffs, and against the Defendant in the amount of $810,887.00, together with costs.

Dated this 25 day of February, 2003

ORIGINAL SIGNED BY
JOHN C. BRACKLEY
DISTRICT COURT JUDGE

APPROVED AS TO FORM:

/s/ Jay Gilbertz
Jay Gilbertz
Attorney for Plaintiffs

/s/ Kevin Huber
Kevin Huber
Attorney for Defendant

Certificate of Clerk of the District Court. The above is a true and correct copy of the original instrument which is on file or of record in this court.
Done this 26 day of Feb 2003
DORIS KOBOLD Clerk
By Lela F. Chapman Deputy
[SEAL]

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2004

PAXTON RESOURCES, L.L.C.,	)	
	)	
Appellant	)	***No. 03-143***
(Defendant),	)	***(2004 WY 93)***
	)	
v.	)	
	)	
DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN,	)	
	)	
Appellees	)	
(Plaintiffs).	)	

ORDER DENYING PETITION FOR REHEARING AND REINSTATEMENT

(Filed Sep. 8, 2004)

This matter came before the Court upon appellant's Petition for Rehearing and Reinstatement of Appeal, filed herein August 26, 2004. The Court, having examined the files and record of the Court and having considered carefully the points raised in appellant's Memorandum of Law in Support of Petition for Rehearing and Reinstatement, as well as the supplement thereto, finds that the petition for rehearing and reinstatement should be denied. It, therefore, is

ORDERED that the Petition for Rehearing and Reinstatement of Appeal, filed herein August 26, 2004, be, and the same hereby is, denied.

DATED this 8th day of September, 2004.

BY THE COURT:

/s/ William U. Hill
WILLIAM U. HILL
Chief Justice

IN THE SUPREME COURT, STATE OF WYOMING

PAXTON RESOURCES, L.L.C. Appellant (Defendant), vs. DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN, Appellees (Plaintiffs).	)	No. 03-143

MOTION TO STAY MANDATE AND ENFORCEMENT OF JUDGMENT PENDING APPEAL TO THE UNITED STATES SUPREME COURT

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COMES NOW Defendant Paxton Resources, L.L.C. ("Paxton"), by and through Kevin D. Huber and P. Craig Silva of Williams, Porter, Day and Neville, and respectfully moves the Court for an *Order Staying Enforcement of the Mandate Dismissing Appeal and Judgment Pending Appeal to the United States Supreme Court.* The grounds for this Motion are as follows:

I. PROCEDURAL HISTORY

1. On August 12, 2004, this Court ruled against Paxton and dismissed Paxton's appeal on the grounds that the *Notice of Appeal* was untimely.

2. On September 8, 2004, this Court denied Paxton's Petition for Rehearing and Reinstatement of said appeal.

3. On that same date, September 8, 2004, this Court issued a *Mandate* dismissing the appeal and endorsing the *Judgment* of the trial court. Subsequently, the *Mandate* record on appeal was returned to the trial court.

4. On September 29, 2004, Paxton petitioned the trial court for an *Order* staying enforcement pending appeal to the United States Supreme Court. (Movant's Ex. 1). In response on or about October 1, 2004, Buck and Mary Brannaman ("the Brannamans") moved to dismiss that motion on the basis that the trial court did not have jurisdiction to stay enforcement and jurisdiction could only be found in the Wyoming and the United States Supreme Courts.[1] (Movant's Ex. 2). Paxton has not yet filed its reply brief to said motion but intends to file such brief.[2]

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[1] The gist of the Brannamans argument is found best in *Brinkman v. The Department of Corrections of the State of Kansas*, 857 F. Supp. 775 (Dist. Kan. 1994), wherein that court ruled that the federal district court retains authority throughout the pendency of the appeal to stay its judgment . . . but upon issuance of the mandate, loses power to stay the judgment. This is premised on application of 28 U.S.C. § 2101(f).

[2] The thrust of that argument will be that the trial court has not been divested of jurisdiction, but does in fact have jurisdiction based on the premise that 28 U.S.C. § 2101(f) provides specifically that the stay may be granted by a judge of the court rendering the judgment. The court rendering the judgment was in fact the trial court. This is confirmed by the fact that W.R.A.P. does not contain a Rule 41(d)(2)

(Continued on following page)

5. In addition, the Brannamans have filed in the trial court a *Motion to Enforce Judgment and Request for Order Directing Clerk of Court to Distribute Funds.* (Movant's Ex. 3). Paxton has not yet filed its response to this motion but does intend to do so.

6. On or about April 4, 2003, $938,426.85 was deposited with the Clerk of Court of the Fourth Judicial District to be placed in an interest bearing account as security to stay enforcement of the judgment. (Movant's Ex. 4). The account currently totals approximately $948,629.89.

II. ARGUMENT

7. Paxton believes that by virtue of W.R.A.P. 9.03 which provides:

> When a judgment or an appealable order is reversed in the appellate court, either in whole or in part, the court reversing shall proceed to render that judgment as the trial court should have rendered, or remand the cause to the trial court for judgment or additional proceedings as the appellate court may direct. If an appellate court reverses or affirms the judgment or appealable order, it shall not issue execution in causes that are brought before it but shall send a mandate to

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which allows a stay of a mandate. Instead, W.R.A.P. at Rule 9.03 specifically returns jurisdiction to the trial court on mandate as if the appealable order "had been rendered in that court." This is why the Brannamans can cite no state case in which 28 U.S.C. § 2101(f) is used in the manner in which they seek its use; in fact, one state case tangentially broaching this subject has held that 28 U.S.C. § 2101(f) "is primarily designed for a stay order from federal court decisions." *O'Neill v. Craig*, 500 S.W.2d 583 (Tex. App. 1973).

> the trial court, as the case may require, for execution, and ***the trial court to which the mandate is sent shall proceed in the same manner as if the judgment or appealable order had been rendered in that court***.

(Emphasis added), the Wyoming Supreme Court does not have jurisdiction to stay an action pending appeal to the United States Supreme Court. Nevertheless, since the Brannamans have taken the position that the stay should be filed in the Wyoming Supreme Court and out of abundance of caution, Paxton now moves to stay enforcement of the judgment pending an appeal to the United States Supreme Court. In other words, assuming without conceding that under 28 U.S.C. 2101(f) jurisdiction for stay pending appeal is vested with the Wyoming Supreme Court, Paxton moves this Court for an Order staying enforcement of the mandate of this Court and the judgment of the District Court pending appeal to the United States Supreme Court.

8. A stay pending appeal to the United States Supreme Court requires a showing under 28 U.S.C. 2102(f) that (a) there is a reasonable probability that certiorari will be granted; (b) significant possibility that the judgment below will be reversed; and (c) likelihood of irreparable harm should the applicant prevail. *Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302-1303 (1991). These elements are met in this case.

9. Although all the research has not yet been completed on the Writ of Certiorari there is at least one cognizable and viable theory in which to appeal. It is critical to remember in this case that the trial judge readily admitted that there were critical errors that the Wyoming Supreme Court should hear. (Movant's Ex. 5).

Moreover, there is no like procedural case in Wyoming on this specific issue. Therefore, one of the theories to support the Writ is that Paxton's Fourteenth Amendment rights to procedural due process were violated when the Court adopted and applied retroactively an unforeseeable interpretation of a state procedural rule that conflicts with the rule's express language and overrules a consistent line of that court's procedural decisions so as to deny the litigant the opportunity to defend its substantive rights. *See e.g. Bouie v. City of Columbia*, 378 U.S. 347, 354-355 (1964) and *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). By dismissing the appeal, the Wyoming Supreme Court has denied Paxton the only appellate opportunity available under state law. Therefore, the trial court's judgment will stand without appellate review and deprive Paxton of over $900,000, thus depriving Paxton of its property without due process of law.

10. While it is true that few writs of certiorari are granted, it is not unheard of for the United Supreme Court to hear cases from the Wyoming Supreme Court. Although not factually or legally on point with this case, the most notable example is *State v. Houghton*, 526 U.S. 295 (1999). As the Court is aware, *Houghton* was decided in 1999 and involved State court interpretation of federal constitutional law on an issue that was obviously deemed important by the United States Supreme Court. The magnitude of the facts of this case and the "harshness" of the dismissal invariably balance the equities in favor of Paxton in regard to receiving acceptance of the Writ by the United States Supreme Court.

11. Moreover, and most significantly, is that the Brannamans are not in a position of being insecure as to receive nothing from their judgment. In fact, the opposite

is true. There is over $900,000.00 in cash not surety deposited with the state district court to ensure payment of the judgment, costs, and interest should Paxton not prevail on its appeal. The same cannot be said for Paxton. Should this Court not grant the stay, and if Paxton prevails at the United States Supreme Court, there is no bond in place for Paxton in order to have returned any monies improperly paid out to the Brannamans. The practical effect would be that Paxton would be unable to or have a difficult time collecting or recovering those monies once paid to the Brannamans. There can be no prejudice to the Brannamans because the money is secure and gaining interest.

WHEREFORE, Defendant Paxton Resources respectfully moves the Court for an *Order Staying Enforcement of Judgment Pending Appeal to the United States Supreme Court.*

Dated this 8th day of October, 2004.

PAXTON RESOURCES, L.L.C.

By: /s/ _____

Kevin D. Huber
P. Craig Silva
Williams, Porter,
Day & Neville, P.C.
P. O. Box 10700
Casper, WY 82602
307-265-0700

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion upon the following by mailing same to them this 8th day of October, 2004:

Michael K. Davis
Jay A. Gilbertz
P. O. Box 6288
Sheridan, WY 82801

/s/ _____
P. Craig Silva

Supreme Court of Wyoming

Office of the Clerk

JUDY PACHECO, CLERK
CAROL THOMPSON, DEPUTY
307-777-7316

[SEAL]

SUPREME COURT BUILDING
2301 CAPITOL AVENUE
CHEYENNE, WY 82002

October 12, 2004

Kevin D. Huber
P. Craig Silva
WILLIAMS, PORTER, DAY & NEVILLE, P.C.
P.O. Box 10700
Casper, WY 82601

Re: Paxton Resources, L.L.C. v. Dan M. "Buck" Brannaman, et al. Supreme Court No. 03-143

Dear Messrs. Huber and Silva:

I am returning your "Motion to Stay Mandate and Enforcement of Judgment Pending Appeal to the United States Supreme Court" without filing. The mandate issued in this matter on September 8, 2004, returning jurisdiction for any further action to the district court. The Wyoming Supreme Court does not have jurisdiction to entertain the above-referenced motion. This case was closed when mandate issued.

Sincerely,

/s/ Judy Pacheco
Judy Pacheco, Clerk

jp

cc: Michael K. Davis & Jay A. Gilbertz

STATE OF WYOMING	)	IN THE DISTRICT COURT
	) SS	
COUNTY OF SHERIDAN	)	FOURTH JUDICIAL DISTRICT
		Civil No. C02-2-47

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN,

Plaintiffs,

vs.

PAXTON RESOURCES, L.L.C.,

Defendant.

DEFENDANT'S MOTION PURSUANT TO RULE 62 TO STAY PROCEEDINGS TO ENFORCE JUDGMENT PENDING APPEAL TO THE UNITED STATES SUPREME COURT

(Filed Sep. 29, 2004)

COMES NOW Defendant Paxton Resources, L.L.C. ("Paxton"), by and through Kevin D. Huber and P. Craig Silva of Williams, Porter, Day and Neville, and respectfully moves the Court for an *Order Staying Enforcement of Judgment Pending Appeal to the United States Supreme Court*. The grounds for this Motion are as follows:

1. Rule 62(d) provides in relevant part "[t]he appellant, when an appeal is taken by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in subdivision (a) and the limitations contained in the Wyoming Rules of Appellate Procedure."

2. Rule 23 of the United States Supreme Court Rules also allows for a stay except the United States Supreme Court will not consider a stay until "the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." A copy of that rule is attached hereto and incorporated herein for the Court's reference.

3. Paxton Resources is intending to file a Writ of Certiorari to the United States Supreme Court. The Writ does not have to be filed until 90 days after the final Wyoming Supreme Court ruling on the case and then will be accepted or rejected thereafter on a schedule determined by the United States Supreme Court. Therefore, Paxton Resources moves for a stay of enforcement pending resolutions of the United States Supreme Court appeal.

4. A cash bond is in place deposited with the clerk of court. This bond has been in place since about the time of the verdict and has been placed in an interest bearing account. The total amount of this bond from the first of the month with interest is $948,629.89. This should be sufficient security for Plaintiffs.

5. Paxton Resources, through counsel, has consulted with Plaintiffs who *do* object to the stay pending appeal to the United States Supreme Court.

WHEREFORE, Defendant Paxton Resources respectfully moves the Court for an *Order Staying Enforcement of Judgment Pending Appeal to the United States Supreme Court.*

Dated this 28th day of September, 2004.

PAXTON RESOURCES, L.L.C.

By: /s/ _____

Kevin D. Huber
P. Craig Silva
Williams, Porter,
Day & Neville, P.C.
P.O. Box 10700
Casper, WY 82602
307-265-0700

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Motion upon the following by mailing same to them this 28th day of September, 2004:

Michael K. Davis
Jay A. Gilbertz
P.O. Box 6288
Sheridan, WY 82801

: /s/ _____
P. Craig Silva

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT WITHIN AND FOR SHERIDAN COUNTY, WYOMING

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN Plaintiffs, vs. PAXTON RESOURCES, L.L.C. Defendant.	)	Civil Action No. C02-2-47

OBJECTION TO DEFENDANT'S MOTION FOR STAY OF ENFORCEMENT

The Plaintiffs, through their undersigned attorney, hereby file this response and objection to Paxton Resources' request for a stay of enforcement proceedings pending a potential petition for a writ of certiorari to the United States Supreme Court. As will be explained in this response, this Court lacks the jurisdiction to entertain this motion or grant Paxton the relief it requests.

In making its request for relief, Paxton improperly cites Wyoming Rule of Civil Procedure 62 as dictating how a stay of enforcement may be obtained when a litigant is requesting that the United States Supreme Court issue a writ of certiorari, and incorrectly suggests that the Defendant must first seek a stay from this Court. (Defendant's motion at ¶ 2.) A writ of certiorari, and therefore any stay of a judgment pending that petition, are matters of federal law. The controlling federal statute requires that Paxton seek the stay from the Wyoming Supreme Court.

The procedure for a litigant seeking to stay the execution of a judgment during the pendency of petition for a writ *of certiorari* is as follows:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

28 U.S.C.A. §2101(f).[1]

Section 2101 provides that a stay may be obtained in only one of two ways, either from a Justice of the United States Supreme Court, or from a "judge of the court **rendering** the judgment." The court rendering the judgment from which Paxton must seek review is the Wyoming Supreme Court. Under the plain terms of the statute, this Court is without authority or jurisdiction to grant the stay, and only the Wyoming Supreme Court or a Justice of the U.S. Supreme Court can grant Paxton's requested relief. The issue was well stated by the New

[1] The full text of §2101 is reproduced in attached Appendix A.

York Federal District Court, "The judgment sought to be reviewed in the Supreme Court is the judgment of the Court of Appeals as embodied in its opinion, not the judgment of this court. Thus this court lacks jurisdiction to grant the relief requested." *Studiengesellschafl Kohle, v. Novamont,* 578 F.Supp. 78, 79 (S.D.N.Y. 1983).

There are numerous federal cases holding that a district court (the trial court) has no jurisdiction to grant a stay when a petition for a writ of certiorari is being made from an appellate court's decision. See *Kozman v. Trans World Airlines,* 145 F. Supp. 140 (S.D.N.Y. 1956), *In re Stumes,* 681 F.2d 524 (8th Cir. 1982), *Hovater v. Equifax Services, Inc.,* 669 F. Supp. 392 (N.D. Al. 1987), *Brinkman v. Department of Corrections,* 857 F. Supp. 775 (D. Kan. 1994), *Gander v. FMC Corp.* 733 F. Supp. 1346 (E.D. Mo. 1990), *Minister v. Illinois Central Gulf R. Co.,* 680 F. Supp. 1346, (S.D. Ill. 1988), *Kurz v. Mairone,* 1993 WL, 21205 (E.D.Pa. 1993).[2]

Section 2101 clearly requires that Paxton seek its requested relief from the court which rendered the opinion from which it seeks to appeal – the Wyoming Supreme Court. Alternatively, the statute allows Paxton to seek this extraordinary relief from the United States Supreme Court itself. However, this Court lacks the jurisdiction to grant the requested stay and must not entertain Paxton's motion.

There are two additional and important reasons why the petition for a stay must be heard by the Wyoming

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[2] Attached as Appendix B are *Studiengesellschaft Kohle, v. Novamont, Hovater v. Equifax Services, Inc., In re Stumes,* and *Kurz v. Mairone.*

Supreme Court. First, the Wyoming Supreme Court's Mandate in this case is clear and stated: "The decision of this Court shall be carried into execution and given full effect without delay." Paxton now invites this Court to disregard the jurisdiction and authority of the Wyoming Supreme Court by ignoring the Mandate and further delaying the inevitable end of this case. Because Paxton seeks to avoid or delay the impact of the Wyoming Supreme Court's Mandate, it must seek its relief from that authority, not the district court which is obligated to effectuate the Mandate.

Second, a stay may only be granted if the issuing court finds that it is equitable to grant the stay after it has balanced the interests of the respective parties *and* finds there is a likelihood that the writ of certiorari will be granted. *Studiengesellschaft Kohle,* 578 F.Supp. at 80. The Wyoming Supreme Court's decision in this case was not based on the judgment rendered by this court, but rather was based on its determination that the Court lacked jurisdiction to hear the appeal because a notice of appeal had not been timely filed in accordance with the Wyoming Rules of Appellate Procedure. This issue was not discussed, argued or decided by this District Court. The Wyoming Supreme Court is in a better position to determine if its decision about the application of Wyoming's rules of civil and appellate procedure is likely to raise an issue of Constitutional proportions sufficient to gain the U.S. Supreme Court's attention.

Finally, the terms and conditions of the security placed with the Clerk of District Court was limited to securing the payment of the judgment, interest and costs through an appeal to the Wyoming Supreme Court, and it was never intended, nor did it provide for, security during

the pendency of an application for certiorari. In the absence of an order from a higher court, the Wyoming Supreme Court's Mandate must be given effect and the funds held by the Clerk of Court must be released to the Plaintiffs.

For the reasons stated above, the Plaintiffs respectfully request that the Court deny Defendant's request for a stay as this Court lacks jurisdiction to grant this relief. Although Defendant has requested a hearing on its motion for a stay of execution, the application of the controlling federal statutes and the lack of jurisdiction in this Court to grant the relief is abundantly clear and the undersigned does not believe a hearing would be helpful.

WHEREFORE, the Plaintiffs, Buck and Mary Brannaman, respectfully request that the Court enter an order denying Plaintiffs request for a stay and issue the order to the Clerk of Court directing disbursement of the funds held by the Clerk as security for the payment of the judgment in this matter.

Dated this 1st day of October, 2004.

YONKEE & TONER, LLP

BY: /s/ Jay A. Gilbertz
Jay A. Gilbertz
Attorneys for Plaintiffs
P. O. Box 6288
Sheridan, WY 82801
(307) 674-7451

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2004 I served a true and correct copy of the above and foregoing document by placing the same in the U.S. Mail postage prepaid to:

Kevin Huber/Craig Silva
Williams, Porter, Day & Neville, P.C.
159 North Wolcott, Suite 400
P. O. Box 10700
Casper, WY 82602
Fax (307) 266-2306

/s/ Jay A. Gilbertz
Jay A. Gilbertz

STATE OF WYOMING	)	IN THE DISTRICT
	)	COURT FOURTH
COUNTY OF SHERIDAN	)SS	JUDICIAL DISTRICT
	)	
	)	Civil No. C02-2-47
DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN,	)	
Plaintiffs,	)	
vs.	)	
PAXTON RESOURCES, L.L.C.,	)	
Defendant.	)	

PAXTON'S REPLY TO PLAINTIFFS' OBJECTION TO PAXTON'S MOTION FOR STAY OF ENFORCEMENT OF THE JUDGMENT PENDING APPEAL TO THE UNITED STATES SUPREME COURT

COMES NOW Defendant Paxton Resources, L.L.C. ("Paxton"), by and through Kevin D. Huber and P. Craig Silva of Williams, Porter, Day and Neville, P.C., and respectfully submits *Paxton's Reply to Plaintiffs' Objection to Paxton's Motion for Stay of Enforcement of the Judgment Pending Appeal to the United States Supreme Court.*

I. BRANNAMANS' ARGUMENTS

The Brannamans basically make three arguments in an effort to prevent the Trial Court from staying enforcement of the judgment pending appeal to the United States Supreme Court. First, the Brannamans argue that the Trial Court by virtue of 28 U.S.C. § 2101(f) (Lexis 2004) and federal case law interpreting that section has no jurisdiction to hear and decide the motion pending appeal

to the United States Supreme Court. Second, that even if this Court did have jurisdiction, Paxton has not met its burden of proof for the granting of such relief. Third, the money currently deposited with the Court and earning interest in an account is not sufficient to guarantee payment of the judgment and somehow the Brannamans are prejudiced if they are not given the funds from the posted amounts. Each of these arguments will be taken up individually herein.

II. PAXTON'S REPLY

A. Jurisdiction.

Under Wyoming law, it is the Trial Court and only the Trial Court that has jurisdiction to grant a stay pending appeal to the United States Supreme Court. Paxton, upon receiving the Brannamans' objection on this issue, proceeded to file a motion for stay with the Wyoming Supreme Court. (Defendant's Ex. A). In response, Judy Pacheco, Clerk of the Wyoming Supreme Court, advised by letter that:

> I am returning your "Motion to Stay Mandate and Enforcement of Judgment Pending Appeal to the United States Supreme Court" without filing. The mandate issued in this matter on September 8, 2004, returning jurisdiction for any further action to the district court. The Wyoming Supreme Court does not have jurisdiction to entertain the above-referenced motion. This case was closed when the mandate issued.

(Defendant's Ex. B). If the Wyoming Supreme Court does not have jurisdiction, then it is the Trial Court who must

decide the issue of a stay pending appeal to the United States Supreme Court.

This conclusion requires no aberrant contortions in logic to be reached. One starts first with 28 U.S.C. § 2101(f) (Lexis 2004), which provides that:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. **The stay may be granted by a judge of the court rendering the judgment or the decree** . . .

(Emphasis added). Obviously, the question then is what Court in this case rendered the judgment? The Court that rendered the judgment in this case was the Trial Court. This conclusion becomes clear when 28 U.S.C. § 2101(f) (Lexis 2004) is read in conjunction with W.R.A.P. 9.03.

In its simplest terms, W.R.A.P 9.03 divests the Wyoming Supreme Court of jurisdiction once the mandate is issued. But beyond that, W.R.A.P. gives back to the Trial Court all the power to administer the case, in other words, all the jurisdiction it had before the appeal was made. W.R.A.P. 9.03 provides:

> If an appellate court reverses or affirms the judgment or appealable order, it shall not issue execution in causes that are brought before it but shall send a mandate to the trial court, as the case may require for execution, **and the trial court to which the mandate is sent shall proceed in the same manner as if the**

judgment or appealable order had been rendered in that court.

(Emphasis added). Consequently, it is the Trial Court receiving that mandate that can treat that mandate or judgment or appealable order as if it has been rendered by it. This includes the power to stay that order pending appeal to the United States Supreme Court. *See* 30 Am. Jur. 2d *Execution and Enforcement of Judgments* § 16 (2004) (the enforcement of a judgment may generally be suspended or stayed by order of the court in accordance with the rule that a court of general jurisdiction has the inherent power to control and stay its judgments); *Carlisle v. United States*, 517 U.S. 416, 439 (1996) (a district court has the inherent power to stay proceedings to control the progress of the cause so as to maintain the orderly process of justice); *Taylor Ditch Co. v. Carey*, 520 P.2d 218, 230 (Wyo. 1974) (the court has the inherent power to stay proceedings to maintain the status quo).

Plaintiffs' argument ignores state procedural law on this issue. This explains why the cases cited by the Brannamans are all federal cases where the rules are different and consequently the result is different. This is best illustrated by *Brinkman v. Department of Corrections of the State of Kansas*, 857 F.Supp. 775 (D. Kan. 1994). In *Brinkman*, the Court held that a federal district court upon issuance of a mandate has jurisdiction consistent with the mandate and cannot stay pending appeal because that power is vested with the circuit court. *Id.* at 776. Logically, that reasoning is correct in federal court for two reasons: first, there is not a federal rule that is akin to W.R.A.P. 9.03; second, and more importantly, the federal rules specifically explain how to stay a mandate and that stay is brought in the circuit court pursuant to F.R.A.P.

41(d)(2)(A). F.R.A.P. 41(d)(2)(A) provides in relevant part that:

> A party may move to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for the stay.

This is why there are few state law cases on this point. It is the difference between the federal rules and the state rules that demands a different result. *See, e.g., O'Neill v. Craig*, 500 S.W.2d 583 (Tex. 13th Dist. 1973) (opining that 28 U.S.C. § 2101(f) is primarily designed for a stay order from a federal court decision). Consequently, the Trial Court does have jurisdiction to decide the stay pending appeal to the United States Supreme Court. To conclude otherwise would be to ignore W.R.C.P. 62(d), which allows for a stay pending appeal and does not distinguish whether that appeal is to the Wyoming Supreme Court or the United States Supreme Court.

B. Burden of Proof.

On the question of burden of proof regarding stay, again, the Brannamans attempt to hold Paxton to the federal standard in regard to granting the stay. That is not the applicable standard under Wyoming law. The state law standard is outlined in W.R.C.P. 62(d): "[t]he appellant, when an appeal is taken by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in subdivision (a) and the limitations contained in the Wyoming Rules of Appellate Procedure." There is no articulated burden of proof under state law as outlined in

W.R.C.P. 62(d). It specifically provides that the Appellant (Paxton) gets a stay if they post a bond. Paxton has done one better and instead of a bond has posted cash, and the amount with interest is currently at $949,464.16, which is a sufficient sum to protect any of the interests of the Brannamans.

In addition, if the Brannamans want to hold Paxton to a federal standard, then by way of argument and not concession or admission, the Brannamans should apply the standard articulated in F.R.A.P. 41 which simply requires a substantial question and good cause for the stay. In this case, there is a substantial question. It is critical to remember in this case that there are no like procedural cases in Wyoming regarding deemed denied motions and the dismissal of appeals. Therefore, one of the theories to support the Writ of Certiorari is that Paxton's Fourteenth Amendment rights to procedural due process were violated when the Court adopted and applied retroactively an unforeseeable interpretation of a state procedural rule that conflicts with the rule's express language and overrules a consistent line of that court's procedural decisions so as to deny the litigant the opportunity to defend its substantive rights. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 354-355 (1964); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). By dismissing the appeal, the Wyoming Supreme Court has denied Paxton the only appellate opportunity available under state law. Therefore, the Trial Court's judgment will stand without appellate review and deprive Paxton of over $900,000, thus depriving Paxton of its property without due process of law. This is a substantial question.

The "good cause" for the stay is that should the Court pay over the funds to the Brannamans now and should

Paxton prevail on its appeal to the United States Supreme Court, then there is no protection for Paxton. The Brannamans could spend the money and Paxton would have no way to recover the funds. This is good cause. Therefore, even under a federal standard, the stay should be granted.

C. Prejudice to Brannamans.

This argument is specious. According to the Plaintiffs the funds posted with the Court were not intended for an appeal to the United States Supreme Court. There is nothing in the record to indicate that those funds could not be used to stay enforcement of the judgment. The Brannamans are fully protected. The account currently has $949,464.16. This should be sufficient to cover a judgment of $810,887.00, costs of $3,691.20, and interest at 10% (approximately $222.16 per day). W.R.C.P. 62 fully contemplates a stay when the bond or, in this case, the cash is posted because it means that the Plaintiffs' interests are protected.

III. CONCLUSION

Wyoming procedural law controls in this case, and as such Paxton is entitled to a stay of the execution of the judgment pending appeal to the United States Supreme Court. Such a result is well within the inherent powers of the Court and the specific powers outlined in W.R.C.P. 62. The Brannamans specifically request that the Court not set this for hearing, but Paxton holds fast to its request that this issue be heard.

Dated this 15th day of October, 2004.

PAXTON RESOURCES, L.L.C.

By: /s/ P. Craig Silva

Kevin D. Huber
P. Craig Silva
Williams, Porter,
Day & Neville, P.C.
P.O. Box 10700
Casper, WY 82602
307-265-0700

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the foregoing **Paxton's Reply to Plaintiffs' Objection to Paxton's Motion for Stay of Enforcement of the Judgment Pending Appeal to the United States Supreme Court** was served upon the following by mailing same to them this 15th day of October, 2004:

Michael K. Davis
Jay A. Gilbertz
P. O. Box 6288
Sheridan, WY 82801

/s/ P. Craig Silva
P. Craig Silva

STATE OF WYOMING) IN THE DISTRICT COURT
) SS
COUNTY OF SHERIDAN) FOURTH JUDICIAL DISTRICT

Civil No. C02-2-47

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN,

Plaintiffs,

vs.

PAXTON RESOURCES, L.L.C.,

Defendant.

DEFENDANT PAXTON RESOURCES, L.L.C.'s MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL OR REMITTITUR

(Filed Feb. 25, 2003)

COMES NOW Defendant Paxton Resources, L.L.C. ("Paxton"), by and through Kevin D. Huber and P. Craig Silva of Williams, Porter, Day and Neville, and respectfully requests this Court issue an order directing entry of judgment as a matter of law in Defendant's favor, in the alternative, grant a new trial in the above-captioned matter, or grant remittitur. In support of this Motion, Defendant relies upon the memorandum of law filed contemporaneously herewith.

Defendant asserts the following grounds in support of this Motion:

1. On February 7, 2003, the jury entered a verdict against Paxton in the total amount of $810,887.00.

2. The judgment was entered on or about February 25, 2003.

3. Rule 50(b) W.R.C.P. provides in relevant part that "If for any reason the court does not grant a motion for judgment as a matter of law at the close of all the evidence, the movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of the judgment and may alternatively request a new trial or join a motion for a new trial under W.R.C.P. 59."

4. Rule 59(a) W.R.C.P provides grounds for a new trial when " . . . (4) [e]xcessive damages appearing to have been given under the influence of passion or prejudice; (5) [e]rror in the assessment of the amount of recovery, whether too large or too small; (6) [T]hat the verdict, report or decision is not sustained by sufficient evidence or is contrary to law; and (7) [e]rror of law occurring at the trial.

5. Any motion for new trial also must be filed 10 days after entry of the judgment.

6. In this case, as evidenced by the trial, there was an absolute lack of probative evidence and legally insufficient evidentiary basis to support the jury's finding that Defendant breached the contract, that those breaches caused damage, and that Plaintiffs were in fact damaged;

7. In this case, as evidenced by the trial, the jury verdict was excessive and the jury was influenced by passion and prejudice, there was an error in the assessment of the amount of recovery, and there was an error of law occurring at the trial in instructing the jury as to the proper measure of damages.

8. Based upon these grounds and as further articulated in Defendant's Memorandum of Law in support hereof, Defendant respectfully requests that this Court grant its Motion for Judgment as a Matter of Law, in the Alternative Motion for a New Trial or Remittitur

WHEREFORE, Defendant requests that the Court enter judgment as a matter of law against the Plaintiffs, in the alternative grant a new trial or remittitur.

Dated this 24th day of February, 2003.

PAXTON RESOURCES, L.L.C.

By: /s/ P. Craig Silva
Kevin Huber
P. Craig Silva
Williams, Porter,
Day & Neville, P.C.
P. O. Box 10700
Casper, WY 82602
307-265-0700

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing pleading upon the following by mailing same to them this 24th day of February, 2003:

Michael K. Davis
Jay A. Gilbertz
P. O. Box 6288
Sheridan, WY 82801

/s/ P. Craig Silva
P. Craig Silva

STATE OF WYOMING) IN THE DISTRICT COURT
) SS
COUNTY OF SHERIDAN) FOURTH JUDICIAL DISTRICT

Civil No. C02-2-47

DAN M. "BUCK" BRANNAMAN)
and MARY C. BRANNAMAN,)
)
Plaintiffs,)
)
vs.)
)
PAXTON RESOURCES, L.L.C.,)
)
Defendant.)

NOTICE OF APPEAL TO
THE WYOMING SUPREME COURT

(Filed Jul. 3, 2003)

TO THE CLERK OF THE ABOVE CAPTIONED DISTRICT COURT:

NOTICE IS HEREBY GIVEN that Paxton Resources, L.L.C., Defendant below and Appellant above, hereby appeals the *Judgment* and the *Order Denying Defendant's Motions for Directed Verdict, New Trial, Remittitur and Supplemental Issue on Newly Discovered Evidence* to the Wyoming Supreme Court entered June 27, 2003 by the District Court for the Fourth Judicial District, Sheridan County, Wyoming. Attached to this notice and incorporated herein is a Certification of Transcript Request pursuant to Rule 2.05 of the Wyoming Rules of Appellate Procedure and a description of the parts of the transcript to be included in the record on appeal in accordance with Rule 3.02 and Appendix as provided by Wyoming Rules of Appellate Procedure Rule 2.07(b).

Dated this 30th day of June, 2003.

PAXTON RESOURCES, LLC

By: /s/ Kevin D. Huber
Kevin Huber
P. Craig Silva
Williams, Porter,
Day & Neville, P.C.
P. O. Box 10700
Casper, WY 82602
307-265-0700

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing Notice of Appeal upon the following by mailing same to them this 30th day of June, 2003:

Michael K. Davis
Jay A. Gilbertz
P. O. Box 6288
Sheridan, WY 82801

/s/ Kevin D. Huber for
P. Craig Silva

Certification of Transcript Request and Description of Parts Intended to Include in Record on Appeal

Appellant Paxton Resources, LLC hereby certifies that it has complied with Wyoming Rules of Appellate Procedure 2.05 regarding ordering a transcript. A transcript of the complete trial proceedings has already been ordered and obtained which will be referenced in the course of Appellant's brief. Appellant has fully complied with the requirements of Rule. 2.05.

In accordance with Rule 3.02(b) W.R.C.P, Appellant hereby gives notice to Appellee of its intent to rely on the entire transcript of the trial proceedings, a select number yet to be determined of the exhibits admitted at trial, all hearing transcripts, and the court file.

Dated this 30th day of June, 2003.

/s/ Kevin D. Huber
Kevin D. Huber
P. Craig Silva
Attorney for Paxton
Resources, LLC

STATE OF WYOMING) IN THE DISTRICT COURT
) :SS
COUNTY OF SHERIDAN) FOURTH JUDICIAL DISTRICT

DAN M. "BUCK" BRANNAMAN and MARY C. BRANNAMAN, Plaintiff, vs. PAXTON RESOURCES, LLC, Defendant.) Civil No. C02-2-47

TRANSCRIPT OF MOTIONS PROCEEDINGS

The above-entitled matter came on to be heard in Open Court before the Honorable John C. Brackley, Judge of the Fourth Judicial District, at Sheridan County, Wyoming on the 9th day of June, 2003 beginning at 8:41 a.m.

The following was taken in machine shorthand by Robert O'Bryan, Official Court Reporter of the Fourth Judicial District in Wyoming.

[2] APPEARANCES

For the Plaintiffs: YONKEE & TONER
P.O. Box 6288
Sheridan, WY 82801

By: Michael K. Davis, Esq. And
Jay A. Gilbertz, Esq.

For the Defendants: WILLIAMS, PORTER, DAY & NEVILLE, PC
P.O. Box 10700
Casper, WY 82602

By: Kevin D. Huber, Esq. and
P. Craig Silva, Esq.

[3] THE COURT: Court is in session. Well, counsel, we've got several motions pending in the file. I guess I have a question just generally for all of you that doesn't have anything to do with legal rulings. But it appears to me as though an appeal is inevitable. So what is the significance to the Defendant of the trial court ruling on all of these motions now, as a practical matter?

MR. SILVA: Well, as a practical matter, if you grant like the motion for new trial on the newly-discovered evidence, that would be significant to the Defendants, because we'd get a chance at our new trial – the jury would be allowed to see the grass that is growing currently out there on the Brannaman ranch. If you granted the remittitur, the remittitur would be significant, as well, Your Honor. I'm going to ask you to reduce the jury verdict significantly. That would be significant to the Defendants.

Maybe the Plaintiffs then would not pursue an appeal on the ruling on the remittitur and the case could be resolved at that stage. Maybe the Defendants would elect not to go forward should you grant the remittitur and appeal the other issues. Depending on how you rule on the motion really changes the whole tenor and the context of the leverage that either party has, whether that be the Plaintiffs or Defendant.

THE COURT: Well, but I'm curious about the law. [4] I don't care about tactics and leverage. I just – I

wanted us to end up with a correct result, and I'm wondering how a ruling from the trial court at this stage is going to help achieve that, because I don't think that it really will. It appears to me that no matter what I say the Supreme Court is going to review the record that was created at trial again, regardless of who sends it there, right?

MR. SILVA: That's one way of looking at it, Judge. That is one way to look at it. The other way to look at it, depending on how the Plaintiffs react to your rulings today, maybe they don't appeal the decision if there's a new trial. Maybe they don't appeal the decision if there is a remittitur. Those are significant issues that I think should be decided.

However, it also controls the timing of the Notice of Appeal. If you elect not to rule on these things, under the rules of appellate procedure the timing of the Notice of Appeal runs from the decision on this motion. So we think that these motions here today need to be decided, Judge.

THE COURT: All right. One other question that I had. I believe that there was a stipulation in April regarding the posting of a bond that would stay execution of any judgment pending appeal. Was the bond in fact posted?

MR. HUBER: Yes, it was, Your Honor. It's been posted with the Clerk of the District Court. As a matter of

* * *

[11] property before subtracted by the value of the property after the damage.

THE COURT: And we had some significant discussions about that damage approach during the trial. And I remember –

MR. SILVA: Ad nauseam, probably.

THE COURT: Well, not really, because it's an important point and, in my view, one of your stronger arguments. I remember asking Plaintiffs if they were sure they wanted me to rule that way because of the case law that would suggest the measure of damages is the before and after value of real property. So, I think that is a significant issue. But because the Court was asked to rule on that ahead of time, receive the briefs, I don't see any sense in changing the Court's position on that now. It was a good argument then; it's still a good argument, I think. But I'm really prepared to let that go to appeal.

MR. SILVA: Okay.

Our next argument that we'd raise is the question of whether there's a breach of contract. In the motion for a new trial and the motion for a judgment as a matter of law, we've raised the issue that there was not a sufficient amount of evidence for a breach of contract.

I think there's numerous provisions that the Plaintiff has cited in the Complaint – if the Court recalls

* * *

[19] So if there are any other questions I can respond to? We just ask that you deny all the motions. The case was fairly and carefully tried to a jury, I think.

Of course, we take issue with your ruling on the trespass claim. But one thing that ruling did; it definitely simplified the issues and made it pretty easy to instruct

the jury on. I think they had proper instructions and they made a decision based upon ample evidence to support the verdict in favor of the Plaintiff.

Is there anything else I can answer for you or respond to?

THE COURT: Probably not anything that we all couldn't talk about over coffee. Thank you, Mr. Davis.

Counsel, I think all trial courts are reluctant to ask people to sit on juries, sit through trials and then take away their decision. As a matter of policy, there better be an awfully good reason to do that, I think. Frankly, there's a couple of points that I'm concerned about in terms of having an error-free record. One of them we've already discussed. That's the measure of damages. Plaintiffs brought up a new theory of recovery regarding contract that, frankly, I had not tried before. The more I think about it, the more I wonder whether or not that was the correct decision. But as I indicated earlier, I think that's a good issue for the folks upstairs to resolve for us [20] all.

The other issue, counsel, that is probably important for you to take a look at is the ability of trial courts to control witnesses via scheduling orders. We recently got a criminal case back where the Supreme Court did not recognize the authority of the trial court to make those types of administrative case management decisions. Obviously, I'm comparing apples to oranges. But in terms of overall effect and perhaps disadvantage to Defendants, based on the, you know, the facts in this case, it's probably an issue. I think there are several things we need the law on, counsel.

My first question to you is still something that's influencing me. I don't see how a ruling of law from the trial court is going to help us get a different or better record than we'll end up with after appeal, so the Court is going to deny the motions for new trial, directed verdict, and remittitur.

Mr. Davis, if you'd do a one-page Minute Order, I think you can get your time for appeal started. I appreciate your efforts, counsel; and it's a good warm-up for what's to come.

Court is in recess.